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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

EWALD NYQUIST, individually and as Commissioner of the New York State Department of Education,

VINCENT GAZZETTA, individually and as Director of the Division of Teacher Certification, New York State Department of Education, and

THOMAS MILANA, individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education,

Appellants,

against

SUSAN M.W. NORWICK,

Appellee,

TARJA U.K. DACHINGER,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

The Commissioner of Education of the State of New York and the other public officers above-named appeal from an Order and Judgment of a three-judge district court entered in the Southern District on August 25, 1976. The Order and Judgment declared New York Education Law § 3001(3) unconstitutional and permanently enjoined its operation on the ground that the statute's exclusion of aliens who had not applied for citizenship from the class of

individuals eligible for permanent teaching certificates denied the excluded aliens the equal protection of the laws under the Fourteenth Amendment.

Opinion Below

The decision of the three-judge district court is reported at 417 F. Supp. 913. It is reproduced in Appendix A, pp. 1a-21a, to this Jurisdictional Statement.

Jurisdiction

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

The judgment of the three-judge district court was entered on August 25, 1976. It is reproduced in Appendix B, p. 22a, to the Jurisdictional Statement.

The Notice of Appeal was filed on October 13, 1976. It is reproduced in Appendix C, pp. 23a-24a, to this Jurisdictional Statement.

State Statute Involved

New York Education Law § 3001 states in part:

> "No person shall be employed or authorized to teach in the public schools of this state who is:
>
> * * *
>
> 3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply after July first, nineteen hundred sixty-seven, to an alien teacher employed pursuant to regulations adopted by the Commissioner of Education permitting such employment."

Questions Presented

1. Should New York Education Law § 3001(3) be reviewed under a heightened equal protection test because it limits permanent teaching certificates to citizens and aliens who have applied for citizenship?

2. Does the classification established by § 3001(3) between citizens and aliens who have applied for citizenship and aliens who have not applied for citizenship reasonably and substantially relate to New York's interests in teaching American citizenship to its youth?

Statement of the Case

Appellees Norwick and Dachinger, plaintiffs below,* are permanent resident aliens (2a, 17a n. 2). Appellee Norwick is a citizen of Great Britain. She has resided in the United States since 1965 and is married to an American citizen (*Ibid.*). She has decided to retain her British nationality indefinitely (2a). Appellee Dachinger is a citizen of Finland (17a n. 2). She has resided in the United States since 1966 and is also married to an American citizen (*Ibid.*). She has decided to retain her Finnish nationality indefinitely (2a).

Appellees applied to the New York Education Department for certificates evidencing their qualifications to teach in the public schools of the state. Their applications were denied because they were not citizens or aliens applying citizenship as required by New York Education Law

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* Appellee Dachinger intervened as a plaintiff with the consent of the defendants-appellants (3a).

("NYEL") § 3001(3) and because they did not come within any exceptional category, i.e., NYEL § 3001-a (authorizing temporary certificates for aliens unable to become permanent residents because of over-subscribed quotas) and 8 New York Code, Rules and Regulations ("NYCRR") § 80.2(i) (authorizing provisional certificates who possess unique skills or are disabled from applying for citizenship) (2a, 17a n. 4).*

Appellees commenced this action for declaratory and injunctive relief on June 27, 1974 (2a). They challenged NYEL §§ 3001 and 3001-a and 8 NYCRR § 80.2(i) as violating their rights to equal protection of the laws and due process of law under the Fourteenth Amendment and as conflicting with the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, and the Supremacy Clause, Article VI, of the United States Constitution. Compl't ¶¶ 18, 19 and 20; Intervenor Compl't ¶¶ 19, 20 and 21; 3a. Jurisdiction was alleged under 42 U.S.C. §§ 1981 and 1983 and 28 U.S.C. § 1343(3) and (4). Compl't ¶ 1; Intervenor Compl't ¶ 1; 3a. A three-judge court was convened with the consent of appellants, and the action was determined on appellees' motion for summary judgment (3a).**

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* Appellee Dachinger applied for a permanent certificate. Intervenor Compl't ¶ 13. Her application was denied on April 23, 1975. *Id.* at ¶ 14. Appellee Norwick applied initially for provisional certification. Compl't ¶ 12. Her application was denied on March 19, 1974 on the ground that she did not meet the requirements of 8 NYCRR § 80.2(i) and upon the additional grounds that she was not a citizen or applicant for citizenship within the meaning of NYEL § 3001(3). *Id.* at ¶ 13.

** A temporary restraining order was entered on August 14, 1974, with appellants' consent, preventing appellants from denying appellee Norwick's application for certification solely on the ground of his alien status. The restraining order continued in effect until the Order and Judgment was entered by district court on August 25, 1976. Appellee Dachinger did not request any interim relief.

The three-judge court limited its holding to appellees' equal protection claim against NYEL § 3001(3) (3a, 19a n. 6, 6a-15a). Although both citizens and aliens may qualify for teaching certificates under NYEL § 3001(3), the district court found that the statute created a suspect classification requiring a showing of necessary relation to a compelling state interest to support its validity. See district court opinion, pp. 6a-10a, relying principally on *Graham* v. *Richardson*, 403 U.S. 365, 372-375 (1971), *Sugarman* v. *Dougall*, 413 U.S. 634, 641 (1973), and *In re Griffiths*, 413 U.S. 717, 719-722 (1973). Turning to the state interests supporting statute, the district court described the vital role of the teacher in educating young people in American political traditions and the significant relationship between the "classroom" and the state's acknowledged power to "'define its political community.'" District court opinion, pp. 10a-11a, quoting *Sugarman* v. *Dougall*, *supra* at 643, in part. The court held, however, that NYEL § 3001(3) could not be sustained under a heightened equal protection test because it was imprecise. The statute's application to all non-applicant aliens and all public school teaching positions was cited as examples of its over- and under-inclusiveness (13a). The exception in favor of provisional certificates for aliens with unique skills, 8 NYCRR § 80.2(i)(1), and citizenship requirements for other professions as well the absence of such requirements were also cited (13a-14a, 21a n. 14). The district court rejected appellees' offer of the testimony of Dr. Anthony E. Terino, then Director of the Division of School Supervision of the Department of Education, because it could not affect the outcome of the case (15a). If called, Dr. Terino would have testified that instruction and training in American citizenship are included in the curriculum of New York's public schools; that in addition to instructing in particular subjects, a teacher serves as a model for his students and influences their attitudes and behavior; and that an alien who voluntarily refuses to apply for citizenship is not an

appropriate teacher in a curriculum that imposes such demands (14a, 15a).

Reasons in Support of Plenary Consideration

New York Education Law § 3001(3) and related provisions advance substantial interests involved in educating the state's youth in principles and practices of American citizenship and defining and preserving its political community. Since both citizens and aliens can obtain permanent teaching certificates under NYEL § 3001(3), the statute should have been reviewed under the traditional reasonable relation test. See *Mathews* v. *Diaz*, ——U.S. ——, 44 U.S.L.W. 4748 (June 1, 1976). The district court's reliance on *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); and *In re Griffiths*, 413 U.S. 717 (1973), as supporting a heightened equal protection test was error given that the classifications in those cases distinguished between citizens and aliens *vel non*. However, even if a strict equal protection test is applied, NYEL § 3001(3) must be sustained. The statute is not imprecise because it focuses on public rather than private or parochial education or because temporary certificates may be issued to some aliens.

A. The equal protection test applicable to NYEL § 3001(3) is one of reasonable relation to a legitimate state interest.

NYEL § 3001(3) authorizes the issuance of permanent teaching certificates to citizens and aliens who apply for citizenship and timely complete the naturalization process.*

* Teaching certificates available to aliens under exceptions to § 3001(3) are not permanent certificates. See NYEL § 3001-a (temporary certificates for aliens unable to become permanent residents because of over-subscribed quotas); § 3005 (temporary certificates for foreign teachers); and 8 NYCRR § 80.2(i) (provisional certificates for aliens with unique teaching skills and those under federal statutory disabilities). The district considered the exceptional categories only with respect to the precision of NYEL § 3001(3) (3a, 18a n. 6, 11a-15a).

The two classes so established consist of citizens and certain aliens—applicants for citizenship—who are identically situated with respect to the benefit provided by the statute and of certain aliens—non-applicants—who are disadvantaged. The statute does not distinguish between citizens and aliens *vel non*.

Given the inclusion of both citizens and aliens in the benefited class, NYEL § 3001(3) does not warrant "close judicial scrutiny." *Graham* v. *Richardson*, *supra* at 372. As this Court held with respect to a similarly drawn classifying statute applicable to the Medicare program, "the real question presented . . . is not whether discrimination between citizens and aliens is permissible; . . . [but] whether the statutory discrimination *within* the class of aliens . . . is permissible." *Mathews* v. *Diaz*, *supra* at 4452 (June 1, 1976) (Emphasis original).* The Court then applied the Fifth Amendment analogue of the reasonable relation test stating that the burden of demonstrating the invalidity of the statute is on the party challenging its constitutionality and consists of the party's advancing reasoning which will "at once invalidate" the classification "yet tolerate a different line separating some aliens from others." *Mathews* v. *Diaz*, *supra* at 4453. Compare *Examining Board of Engineers, Architects and Surveyors* v. *de Otero*, —— U.S. ——, 44 U.S.L.W. 4890, 4899-4901 (June 17, 1976) (applying "strict judicial scrutiny" to citizenship requirements to practice engineering, architecture and surveying); *In re Griffiths*, 413 U.S. 717 (1973) (applying same standard to citizenship requirement to practice law); and *Sugarman* v. *Dougalt*, *supra* (applying same standard to citizenship requirement for permanent civil service employment).

* 42 U.S.C. § 1395o(2)(B) was in issue in *Diaz*, *supra*. The statute authorized Medicare benefits for aliens with five years permanent residence.

Graham v. *Richardson, supra,* is consistent with this view. In support of the application of a heightened equal protection test to a classification "based on alienage," this Court referred to aliens as a "prime example of a 'discrete and insular' minority." *Graham* v. *Richardson, supra* at 372, quoting *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-153 n. 4 (1938), in part. However, if aliens are included with citizens, as they are under NYEL § 3001(3), the resulting classification cannot be *based* on alienage, and the alien cannot claim minority status to support special or heightened judicial concern.

Even if NYEL § 3001(3) is considered as a classification "based on alienage" under *Graham* v. *Richardson, supra* at 372, the reasonable relation test is applicable. Notwithstanding its reliance on the strict scrutiny standard in *Sugarman* v. *Dougall, supra,* this Court recognized that there were certain alienage classifications for which the reasonable relation test continued. If a state requires citizenship as a qualification "in an appropriately defined class of positions" with respect to "matters firmly within . . . [its] constitutional prerogatives," "scrutiny will not be so demanding," i.e. the reasonable relation test applies. Id. at 647, 648. NYEL § 3001(3) is such a classification. As further appears from the discussion at Subpoint B, NYEL § 3001(3) is limited to teaching certificates in the state public schools, a matter firmly within the state's regulatory power and affecting the definition of its own "'political community'". *Ibid.* quoting *Dunn* v. *Blumstein,* 405 U.S. 330, 344 (1972).

B. New York's interests in educating its youth in the principles and practices of American citizenship are legitimate and substantial. In denying permanent teaching certificates to aliens who refuse American citizenship, NYEL § 3001(3) establishes a narrow limitation which is consistent with the achievement of those intrests.

"Our public educational system is the genius of our democracy. The needs of our youth are developed there and the character of that development will determine the future of our land. Indeed, our very existence depends on it." *Keyishian* v. *Board of Regents of the State of New York,* 385 U.S. 589, 623 (1967) (CLARK, J. dissenting). "It is the very foundation of good citizenship." *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954). See also *Adler* v. *Board of Education,* 342 U.S. 485, 508 (1952) (DOUGLAS, J., dissenting).

Education in "good citizenship" is not limited to instruction about American political institutions but includes the transmission of social, cultural and political values, attitudes and behaviors. *Brown* v. *Board of Education, supra;* See Note, *Alien's Right to Teach: Political Socialization and the Public Schools,* 85(1) Yale Law Journal, 90, 99-103 (1975) (hereinafter, "Alien's Right to Teach, p. ——").

The public school teacher has a unique responsibility in this process because his instruction consists of his own example as well as the particular subject matter he imparts. Alien's Right to Teach, pp. 102-105. The State may, therefore, require him to be "especially qualified." *Meyer* v. *Nebraska,* 262 U.S. 390, 401 (1923). In permitting the applicant alien to assume this responsibility on a permanent basis and excluding the non-applicant alien, NYEL § 3001(3) attains a perfect congruence between the teaching function and the qualifications of individual teachers. The alien who has affirmatively identified himself with the heritage he must transmit is eligible; the alien who volun-

tarily refuses that undertaking, preferring to retain his primary identification with and allegiance to a different national heritage is not eligible. See *Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1937); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596 (1952) (FRANKFURTER, J. concurring). The suggestion that aliens should be qualified for permanent positions on a case by case basis inapposite. See district court opinion, p. 15a. It is the alien's refusal to undertake procedures for naturalization which makes him peculiarly unsuited for a permanent position, and no individualized determination would affect the basis for the disqualification.tion.

That NYEL § 3001(3) does not apply to the certification of teachers in private and parochial schools does not make it imprecise.* Compare district court opinion, p. 13. A State may consider its publicly funded schools as the institutions principally concerned with transmitting American societal values. It may also permit parents to choose those cultural and religious values they wish to impart to their children. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

The several exceptional categories which authorize teaching certificates for non-applicant aliens do not frustrate the purposes of NYEL § 3001(3) or provide a basis for finding it imprecise. See NYEL §§ 3001-a and 3005; 8 NYCRR § 80.2(i). The common factor in all the exceptional categories is that they authorize only temporary certificates and thus operate without impairing the purposes of § 3001(3).

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* NYEL § 3001(3) is also limited to elementary and secondary schools since the State Education Department does not perform any certification functions for teachers in public or private universities and colleges. To the extent that *Kay* v. *Board of Higher Education of the City of New York*, 173 Misc. 943, 18 N.Y.S. 2d 821 (Sup. Ct. Monroe Co.), aff'd 259 App. Div. 879, app. den. 259 App. Div. 1000, 284 NY 578 (1940), implies the contrary, it is in error.

The largest of the exceptional category consists of aliens whose federally imposed disabilities prevent their applying for American citizenship. NYEL § 3001-a and 8 NYCRR § 80.2(i)(2). Their evident purpose is to provide access to the teaching profession for those aliens who cannot meet the requirements of § 3001(3) through no fault of their own.

NYEL § 3005 refers to the temporary licensing of alien teachers who are in the United States on various exchange programs and whose participation in the public schools is sought for the very purpose of providing instruction in and examples of the political, social cultural traditions of other nationalities. Compare district court opinion, p. 15a.

8 NYCRR § 80.2(i)(1) is a limited waiver provision which authorizes the certification of aliens with unique skills on a temporary basis. The regulation thus permits the public educational system to meet its pedagogical needs. It need not decline to give a particular course because an individual who meets the qualifications of NYEL § 3001 (3) is not avialable. However, this exceptional category is not comparable to the waivers considered in *Sugarman* v. *Dougall, supra.* Therein, the alien who entered the competitive civil service on waivers could obtain a permanent position. Not so the teacher under 8 NYCRR § 80, 2(i)(1). The continuance of his license is within the discretionary authority the Commissioner of Education, and he cannot become permanent except upon compliance with NYEL § 3001(3).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, December 10, 1976.

Respectfully submitted,

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APPENDIX A

Opinion of the Three-Judge District Court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2798 (WCC)

OPINION

SUSAN M. W. NORWICK,
Plaintiff,

TARJA U. K. DACHINGER,
Intervenor Plaintiff,

—against—

EWALD NYQUIST, individually and as Commissioner of the New York State Department of Education, VINCENT GAZZETTA, individually and as Director of the Division of Teacher Certification, New York State Department of Education, and THOMAS MILANA, individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education,
Defendants.

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BEFORE:

WILFRED FEINBERG, United States Circuit Judge, Second Circuit

LAWRENCE W. PIERCE, United States District Judge

WILLIAM C. CONNER, United States District Judge

CONNER, D. J.:

This action represents yet another chapter in the expanding volume of cases involving constitutional challenges to State statutes and regulations designed to limit certain types of employment to citizens, thereby excluding, among others, permanent resident aliens.[1] In the present case, plaintiffs[2] contest the validity of Section 3001(3) of the New York Education Law, which provides that no alien may be employed to teach in the public schools of New York State (the public schools), unless and until that alien has made application to become a United States citizen and thereafter proceeds, in due course, to become a citizen.[3]

Plaintiffs, aliens who have elected to retain their native citizenship (non-applicant aliens), have both applied for certification to teach in the public schools. However, because they do not fit within the limited exceptions to Section 3001(3), plaintiffs have been denied certification.[4] It is undisputed that, in both cases, the denial of certification has borne no relation to plaintiffs' general character or

qualifications, but rather, is solely the product of their status as non-applicant aliens.

On June 27, 1974, plaintiff Norwick commenced this action for injunctive and declaratory relief. She asserts, in addition to other claims, a cause of action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343. With the consent of defendants,[5] the Court entered orders dated September 9, 1975 and December 18, 1975, convening a three-judge constitutional court pursuant to 28 U.S.C. §§ 2281 and 2284 and granting plaintiff Dachinger's motion to intervene.

Presently before the Court is plaintiffs' motion, pursuant to Rule 56 F.R.Civ.P., for a summary judgment declaring Section 3001(3) unconstitutional and enjoining its further enforcement.

I.

It is beyond reasonable dispute that the power of New York, or any other state, to promulgate regulatory legislation such as Section 3001(3) is qualified by various provisions of the United States Constitution. In this case, plaintiffs claim that the ban of Section 3001(3)[6] on certification of non-applicant aliens for teaching positions in the public schools offends the Equal Protection and Due Process Clauses of the fourteenth amendment and the Supremacy Clause of Article VI.

We are not insensible of the Supreme Court's admonition that a three-judge court should consider constitutional challenges to State statutes only if non-constitutional "statutory" Supremacy Clause issues, within the jurisdiction of a single judge, prove not to be dispositive. *Hagans* v. *Lavine,* Nonetheless, it should be stressed that *Hagans* has neither expanded nor diminished the basic jurisdictional authority of either single-judge or three-judge district courts. To the contrary, the *Hagans* ruling is ad-

dressed to procedure only. Thus, the *Hagans* Court, in the interests of judicial economy and in light of " 'the constrictive view of * * * three-judge [court] jurisdiction which [the Supreme Court] has traditionally taken'," concluded and directed that the single judge should exhaust all potentially dispositive claims within his jurisdiction before resort to a three-judge court. Hence, where constitutional claims over which a three-judge court would have exclusive jurisdiction coincide with non-constitutional claims reviewable by a single judge, *Hagans* directs the single judge, before convention of a three-judge court, to do no more than the latter would itself be required to do, *i.e.*, to dispose of the litigation on non-constitutional grounds, if possible, pursuant to the well settled rule that "a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans* v. *Lavine, supra*, at 546-47.

Typically, the *Hagans* doctrine has been applied to cases in which specific State statutes or regulations are asserted to be in conflict with specific federal statutory or regulatory provisions, *e.g.*, *Holley* v. *Lavine*, 529 F.2d 1294, 1296 (2d Cir. 1976); *Roe* v. *Norton*, 522 F.2d 928 (2d Cir. 1975); *Roe* v. *Ferguson*, 515 F.2d 279 (6th Cir. 1975); *Brown* v. *Beal*, 404 F.Supp. 770 (E.D.Pa. 1975). In such cases, it is the single judge's office merely to "interpret[] the [applicable] statute and * * * regulation," *Holley* v. *Lavine, supra* at 1296, and to determine whether there is a conflict with federal enactments addressed to the same subject matter. It is axiomatic that, should the reviewing judge identify such a conflict, under the Supremacy Clause the State statute must defer to the federal. It was that type of question, resting upon a statutory comparison, that *Hagans* denominated a "Supremacy Clause ('statutory')" issue. *Hagans* v. *Lavine, supra*, at 545. Although, within such a context, a State statute or regulation may be declared "unconstitutional," *i.e.*, violative of the Supremacy Clause, see, *e.g.*,

DeCanas v. *Bica*, 44 U.S.L.W. 4235, 4236 (U.S. February 25, 1976), the judge can decide the issue without having to interpret the Constitution.

This is a very different case. Here, despite plaintiffs' sweeping citation to the bulk of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., the purported conflict underlying plaintiffs' Supremacy Clause argument is not between Section 3001(3) and any specific enactment of Congress, but rather, betweeen Section 3001(3) and the exclusive power to regulate immigration and naturalization vested in the federal government by Article 1, Section 8, clause 4 of the United States Constitution. Unlike the clearly "statutory" Supremacy Clause argument in *Hagans*, the Supremacy Clause argument in this case derives exclusively and directly from the Federal Constitution rather than from federal legislation, entails an immediate resort to the Constitution and, if "substantial," see *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973), requires the convention of a three-judge court.

The conclusion that the present Supremacy Clause argument is "constitutional" rather than "statutory" is supported inferentially, by a number of similar cases. Thus, in *Graham* v. *Richardson*, 403 U.S. 365 (1971), the Supreme Court ruled in favor of the alien plaintiffs on *both* equal protection and Supremacy Clause grounds. In *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), the Supreme Court elected to affirm the lower court on equal protection grounds, ignoring the Supremacy Clause argument that had been adopted by the court below. Although these decisions are pre-*Hagans*, they by no means pre-date the doctrine that constitutional rulings are to be avoided whenever possible. More recently, in a post-*Hagans* decision, Judge Gurfein, writing for a three-judge panel in the Eastern District of New York, ruled New York Labor Law Section 222 unconstitutional on both equal protection and Supremacy Clause grounds, *C.D.R. Enterprises, Ltd.* v. *Board of Education*

of the City of New York, 75 Civ. 1172 (E.D.N.Y. 1976), without any discussion of *Hagans*.

We therefore believe that the Supremacy Clause claim herein is more properly viewed as a true "constitutional" argument which was thus beyond the convening court's jurisdiction. In any event, the determination whether it is constitutional or statutory is at least sufficiently troublesome that *Hagans*' stated objective of judicial efficiency would seem better served not by the extensive digression which such determination would require but by proceeding directly to the clearly constitutional equal protection argument which we find dispositive.

For reasons outlined in considerable detail below, this Court concludes that Section 3001(3) violates the Equal Protection Clause of the fourteenth amendment. Thus, plaintiffs' motion for summary judgment must be granted and we need not consider plaintiffs' due process and Supremacy Clause arguments.

II.

At the threshold of any equal protection analysis, a reviewing court must of course identify the standard of judicial scrutiny that is appropriate to the case before it. Under familiar principles, if a regulation impinges upon a "fundamental right," *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), or creates an inherently "suspect classification" such as race, nationality or alienage, the challenged provision will be subjected to "close judicial scrutiny," requiring the State to establish a "compelling interest in its enactment. See, *e.g., Graham* v. *Richardson*, supra, at 372-75 (1971). As the Supreme Court has recently observed, a State that employs

> "a suspect classification, 'bears a heavy burden of justification,' • • •, a burden which, though variously

> formulated requires [a] State to • • • show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary • • • to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths*, 413 U.S. 717, 721-22 (1973) (footnotes omitted).

If, on the other hand, the regulation does not affect a fundamental right or create a suspect classification, it has traditionally been accorded a presumption of constitutionality that may not be disturbed unless the enactment is shown to rest on grounds "wholly irrelevant to the achievement of [a legitimate] state[] objective." *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961); see also *Williamson* v. *Lee Optical*, 348 U.S. 483 (1955); *Metropolis Theater Co.* v. *City of Chicago*, 228 U.S. 61 (1913).[7]

In an effort to avoid the "heavy burden" imposed upon those seeking to establish a compelling state interest in a particular legislation, defendants refer us to the several Supreme Court decisions that have measured the constitutionality of a number of state statutes against the more lenient "rational relationship" standard. *Schware* v. *Board of Law Examiners of New Mexico*, 353 U.S. 232, 239 (1957); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955); *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U.S. 552, 556 (1947).[8]

Defendants correctly observe that the cited cases, like that at bar, involve constitutional challenges to State statutes regulating professions or trades invested with a strong public interest. On the basis of that kinship, defendants urge us to adopt here the same standard of review. We cannot do so. The appropriate standard of judicial review is determined, not by the strength of the public interest sought to be protected, but rather by the nature of the right (fundamental or not) being regulated and/or the type of classification (suspect or not) which the regulation cre-

ates. Since none of the Supreme Court decisions cited above involved a statute affecting any fundamental right or creating any suspect classification, application of the rational relationship test was there indicated. That is not the situation here.

Ninety years ago, the Supreme Court first ruled that an alien is a "person" entitled to the safeguards afforded by the Due Process and Equal Protection Clauses of the fourteenth amendment. *Yick Wo* v. *Hopkins,* 118 U.S. 356, 369 (1886). See also In re *Griffiths, supra,* at 719-20; *Sugarman* v. *Dougall,* 413 U.S. 634, 641 (1973); *Graham* v. *Richardson, supra,* at 371; *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 420 (1948); *Traux* v. *Raich,* 239 U.S. 33, 39 (1915); *Wong Wing* v. *United States,* 123 U.S. 228, 238 (1896). Those safeguards were subsequently ruled to protect aliens seeking employment "in the common occupations of the community,"[9] *Traux* v. *Raich, supra,* at 41; *Sugarman* v. *Dougall, supra* at 641. Indeed, the power "to apply [State] laws exclusively to • • • alien[s] • • • as a class [has been steadily] confined within narrow limits." *Takahashi* v. *Fish & Game Commission, supra,* at 420. However, the precise standard for judicial review of statutes creating classifications based on alienage remained undefined until this decade. Finally, in the landmark case of *Graham* v. *Richardson, supra,* the Supreme Court, in striking down a State statute denying welfare benefits to resident aliens, ruled that

> "classifications based on alienage • • • are inherently suspect and subject to close judicial scrutiny." *Id.* at 372.

Writing for the Court, Justice Blackmun observed that

> "[a]liens as a class are a prime example of a 'discrete and insular' minority • • • for whom such heightened judicial solicitude is appropriate." *Id.* at 372.

In subsequent decisions, the Supreme Court has applied the rationale of *Graham* to its review of State statutes foreclosing aliens from a variety of public and non-public jobs.

Thus, in *Sugarman* v. *Dougall, supra,* the Supreme Court considered an equal protection challenge to Section 53 of the New York Civil Service Law, which denied aliens the right to hold positions in New York's "competitive civil service." Section 53 did not survive the *Sugarman* Court's strict scrutiny. Having indicated that Section 53 was both overinclusive and underinclusive, the Court rested its ruling on the statute's fatal imprecision.

Decided the same day as *Sugarman* was In re *Griffiths, supra,* in which the Supreme Court condemned a Connecticut statute that excluded aliens from the practice of law. Earlier this year, Judge Weinfeld, in striking down Section 6524(b) of New York's Education Law,[10] offered the following précis of the *Griffiths* decision:

> "The Court premised its judgment upon basic constitutional concepts: first, that a lawfully admitted resident alien is a 'person' within the Fourteenth Amendment's prohibition against denial 'to any person within its jurisdiction the equal protection of the laws'; second, that the 'right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure'; third, that 'classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny'; fourth, that a state which adopts a suspect classification 'bears a heavy burden of justification'; and fifth, that 'to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial and that its

use is "necessary • • • to the accomplishment" of its purpose or the safeguarding of its interest'." *Surmeli* v. *New York,* 75 Civ. 4520 (S.D.N.Y. April 7, 1976) (footnotes omitted).

It is the opinion of this panel that *Graham, Sugarman* and *Griffiths* establish, beyond peradventure, that any challenged State statute or regulation placing aliens, as a class, at a disadvantage vis-à-vis citizens must withstand the rigors of close judicial scrutiny.[11] Thus, the deprivation protested by plaintiffs herein can be justified only if Section 3001(3) is shown to be a *necessary* implement of a *compelling* state interest. We "therefore look to the substantiality of the State's interest in enforcing [Section 3001(3)], and to the narrowness of the limits within which the discrimination is confined." *Sugarman* v. *Dougall, supra,* at 642.

III.

In attempted justification of Section 3001(3), defendants assert that, "Given the vital role of the educational system in the American democracy," the State has a compelling interest in the assurance that those who minister to the educational needs of its young are qualified, both by profession and example, to transmit the American heritage to their students. Thus, defendants argue, in furtherance of this interest,

> "it • • • does not offend the equal protection rights of aliens to require that in order to obtain teaching positions within that system, they act affirmatively to identify themselves with that democracy. By obtaining declarant status (and timely completing the naturalization process), the alien has provided objective evidence that he in fact believes in the American heritage which he in turn is obliged to transmit to his students."

Defendants urge that the State-required oath of allegiance, in which plaintiffs expressly stand ready to join, is an inadequate badge of identification with the United States.[12] Section 3001(3), defendants conclude, "is certainly an appropriate if not the 'least drastic means' for effectuating" the interest it was enacted to support.

To be sure, a "teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern." *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952). Accordingly, "[t]here can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools • • •," *Shelton* v. *Tucker,* 364 U.S. 479, 485 (1965) (footnote omitted), and there is "no requirement • • • that a teacher's classroom conduct be the sole basis for determining • • • fitness." *Beilan* v. *Board of Education,* 357 U.S. 399, 406 (1958). Moreover, in a somewhat different context, the Supreme Court has acknowledged that the "State's broad power to define its political community" might include "requir[ing] citizenship" in "an appropriately defined class of positions." *Sugarman* v. *Dougall, supra,* at 642-43, 646-47.

Thus aware that the Supreme Court has recognized a strong nexus between the classroom and the political community and that it has at least intimated its approval of citizenship requirements for jobs bearing a relationship to the State's ability to "define its political community," one might infer that teaching fits within the narrow area of allowable discrimination discussed in Sugarman.[13]

This Court must be no less aware, however, of *Sugarman's* ultimate stricture: when a State seeks to vindicate even a compelling interest, through discrimination, "the

means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.* at 653. Even if Section 3001(3) had safely negotiated all of the other shoals, on this rock it clearly founders.

Defendants have attempted to justify the sweeping breath of Section 3001(3) by exhuming an argument laid to rest in *Griffiths* and *Sugarman,* contrasting the undivided allegiance which a citizen presumptively bears to this country with a resident alien's potential conflict of loyalties. On the basis of this supposed conflict, defendants would have us conclusively presume that all those who elect not to seek U.S. citizenship, regardless of their nation of birth, the academic subject they seek to teach, the nature and strength of their ties to this country or their willingness to pledge allegiance to it, are unqualified for such responsibilities.

The Supreme Court rejected a like "undivided allegiance" argument advanced by the defendants in *Sugarman* because, in that case,

> "the State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose.
>
> • • • •
>
> [Section 53's] imposed ineligibility may apply to the 'sanitation man, class B,' Perotta v. Gregory, 4 Misc. 2d 769, 158 N.Y.S. 2d 221 (1957), to the typist, and to the office worker, as well as to the person who directly participates in the formulation and execution of important state policy. The citizenship restriction sweeps indiscriminately." *Id.* at 642-42.

As with the statute challenged in *Sugarman,* Section 3001(3) is damned by its imprecision. It excludes *all* non-applicant aliens, regardless of nationality, from *all* teaching positions in the public school system, regardless of grade level or subject matter.[14] It thus bars British subjects seeking certification to teach mathematics or physical education as well as Soviet citizens seeking to teach civics or economics. The statute's imprecision becomes even more glaring when one considers that the prohibition does not extend to those who teach the thousands of New York children attending private schools. Indeed, even in the public schools, under an amorphous exception to Section 3001(3), the State would permit a non-applicant alien to obtain certification to teach certain subjects requiring "skills or competencies not readily available among teachers holding citizenship."

In *Griffiths,* the undivided allegiance argument was labeled "unconvincing" and the Supreme Court declared the possibility that some aliens might be unsuited to a particular profession no "justification for a wholesale ban." *Id.* at 725; *cf. Hampton* v. *Mow Sun Wong,* 44 U.S.L.W. 4737, 4745 (U.S. June 1, 1976). The applicability of the reasoning of *Griffiths* to the statute challenged here is apparent from the following quotation from that opinion, substituting appropriate references to the State and profession involved:

> "Although, as we have acknowledged, a State does have a substantial interest in the qualifications of those [certified to teach in the public schools], the arguments advanced by the [defendants] fall short of showing that the classification established by [Section 3001(3)] is necessary to the promoting or safeguarding of this interest. [New York] has wide freedom to gauge on a case-by-case basis the fitness of an applicant to [teach]. • • • [New York] can • • • require appro-

priate training and familiarity with [the subject matter to be taught]. Apart from such tests of competence, it requires a new [teacher] to take [an oath] to 'support the constitution of the United States, and the constitution of the State of [New York].' [Plaintiffs have] indicated [their] willingness and ability to subscribe to the • • • oath[], and [New York] may quite properly conduct a character investigation to insure in any given case 'that an applicant is not one who "swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath." *Bond* v. *Floyd,* 385 U.S. 116, 132.' *Law Students Research Council* v. *Wadmond,* 401 U.S. at 164. Moreover, [teachers] are subject to continuing scrutiny by [their superiors] • • •. In sum, [defendants] simply [have] not established that [the State] must exclude all aliens from the [teaching profession] in order tc vindicate its undoubted interest • • •." In re *Griffiths, supra,* at 725-26 (footnotes omitted).

The question remains whether, via an evidentiary hearing, the State might establish a necessary connection between Section 3001(3) and the public interest herein involved. In this context, and at the request of the Court, defendants' counsel has submitted, in affidavit form, an offer of proof requesting an opportunity to call Dr. Anthony E. Terino, Director of the Division of School Supervision of the New York State Department of Education. It is represented that Dr. Terino would testify that 1) teachers are required to convey principles of American citizenship to their students; 2) the function of a teacher is not limited to imparting particular subject matter; the teacher also serves as an example for his students "from which they acquire knowledge and are influenced in the formation of their attitudes and behavior patterns" and 3) aliens who

voluntarily refuse naturalization "are not appropriate teachers in a curriculum that requires imparting principles of American citizenship."

In our opinion, the further delay that would be occasioned by an evidentiary hearing would be unjustified. It is inconceivable that defendants could establish, on the basis of the proposed testimony of Dr. Terino, that a broad exclusion of *all* non-applicant aliens from *all* teaching positions is necessary to the advancement of New York's claimed interest.

No doubt teachers and their students may engage in exchanges reaching beyond the scope of a particular course of instruction. Nevertheless, defendants' position that, regardless of his other attributes, the non-applicant alien's voluntary decision to retain his native citizenship necessarily renders him, by example, a negative influence, and thus inherently unqualified to teach, is unsupported by anything in the present record. Nor would such a conclusion be supported by the proposed testimony of Dr. Terino. Indeed, New York's attempt to exclude all non-applicant aliens from its academic community seems repugnant to the very heritage the State is seeking to inculcate. As the Supreme Court recognized, albeit in a somewhat different context, statutes which "cast a pall of orthodoxy over the classroom" are ultimately destructive.

> "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603 (1967). (citations omitted).

We conclude that Section 3001(3) is unconstitutional and that its further enforcement must be enjoined.

Opinion.

Plaintiffs' motion for summary judgment is granted. Submit order on notice.

Dated: New York, New York, July 20, 1976.

WILFRED FEINBERG
Wilfred Feinberg,
United States Circuit Judge

LAWRENCE W. PIERCE
Lawrence W. Pierce,
United States District Judge

WILLIAM C. CONNER
William C. Conner,
United States District Judge

Opinion.

FOOTNOTES

[1] See, *e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973); Foley v. Connelie, 75 Civ. 4548 (S.D.N.Y. July 8, 1976); Surmeli v. New York, 75 Civ. 4520 (S.D.N.Y. April 7, 1976); C.D.R. Enterprises, Ltd. v. Board of Education of the City of New York, 75 Civ. 1172 (E.D.N.Y. March 1976); Mauclet v. Nyquist, 75 Civ. 73 (E.D.N.Y. February 11, 1976).

[2] Plaintiff Susan M. W. Norwick was born in Dundee, Scotland and is a British subject. Married to a United States citizen, she is a federally registered resident alien and has resided in this country since 1965. Ms. Norwick is a graduate of North Adams State College in Massachusetts, where she received a B.A. degree *summa cum laude*. She is presently a full-time graduate student in Developmental Reading at the State University of New York at Albany, where she has compiled a straight A average. Since 1960, Ms. Norwick has been periodically employed as a teacher both in this country and in Great Britain.

Intervenor-plaintiff Tarja U. K. Dachinger was born in Turku, Finland and remains a citizen of that country. Ms. Dachinger majored in German at Lehman College, from which she received a B.A. degree *cum laude* and an M.S. degree in Early Childhood Education. She is married to a U. S. citizen and has resided in this country since 1966.

[3] Section 3001(3) provides, *inter alia:*

> "No person shall be employed or authorized to teach in the public schools of this state who is:
>
> • • •
>
> 3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien [who] make[s] due application to become a citizen and thereafter within the time prescribed by law shall become a citizen."

[4] The only exceptions to Section 3001(3) are contained in Section 3001-a of the New York Education Law and Section 80.2(i) of 8 New York Code of Rules and Regulations.

New York Education Law § 3001-a provides:

> "A person, not a citizen, who files with the department satisfactory proof that he has filed with the attorney general of the United States a first preference petition pursuant to section two hundred three (a)(1) of the immigration and nationality act [8 U.S.C.A. § 1153(a)(1)] and that said petition has been approved by such attorney general upon certification by the department of justice, immigration and naturaliza-

tion service, that he is unable to adjust his status to that of a lawful permanent resident of the United States solely because of an over-subscribed quota to which he is chargeable may receive from the commissioner of education, notwithstanding the provisions of subdivision three of section three thousand one of this chapter, a temporary permit validating his employment in a teaching capacity in the public schools of the state. Such temporary permit shall be valid for one year from the date of issue and may, upon propor application to the commissioner, be once renewed for a further period of one year. Such application shall be in the form required by the commissioner. Such applicant shall not be employed until he shall have taken and subscribed the following oath or affirmation:

'I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of . . . (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned.' The affidavit and oath required by this section shall be administered by the superintendent of schools having jurisdiction over the school district in which such person is to be employed or his duly authorized representative and shall be filed with the commissioner of education. Copies thereof shall be filed with the superintendent of schools."

Section 80.2(i) of 8 New York Code of Rules and Regulations provides:

> "*Citizenship.* A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons."

[5] The individual defendants, public officials serving within the New York State Department of Education, are responsible for the implementation and enforcement of the statutes and regulation challenged herein.

[6] Although the complaints filed in this action refer to "Sections 3001 and 3001-a of the New York Education Law and Section 80.2 of the Regulations of the Commissioner of Education of the State

of New York," it is clear that a ruling on the constitutionality of Section 3001(3) will be dispositive of this entire case. None of the other subdivisions of Section 3001 has been challenged in this action. Sections 3001-a and 80.2(i), which provide limited exceptions to Section 3001(3), are challenged only to the extent that as exceptions to a disallowance they might imply the existence of a disallowance. This Court need only note that, should we find it necessary to invalidate Section 3001(3), Sections 3001-a and 80.2(i) could not conceivably operate to deny plaintiffs the certification they require to teach. Accordingly, we restrict our review to Section 3001(3). See In re Griffiths, 413 U.S. 717, 726 n.17 (1973).

[7] In recent years, the Supreme Court has apparently been less willing to accord even those statutes involving non-fundamental, non-suspect categories the virtually automatic approval that such legislation had historically enjoyed. The Court has indicated that a statute creating any classification must at least "be reasonable, not arbitrary, and must rest upon some ground or difference having a *fair and substantial* relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Reed v. Reed, 404 U.S. 71, 76 (1971) (emphasis added).

See generally Gunther, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine of a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L. Rev. 1 (1972); Note, Legislative Purpose, Rationality and Equal Protection, 82 Yale L.J. 123 (1972). See also Massachusetts Bd. of Retirement v. Murgia, 44 U.S.L.W. 5077, 5081 (U.S. June 25, 1976) (Marshall, J., dissenting).

[8] Defendants also direct the Court to Law Students Research Council v. Wadmond, 401 U.S. 154 (1971) and United Public Workers of America v. Mitchell, 330 U.S. 75 (1947). In Wadmond, the Supreme Court considered a challenge, on first amendment vagueness and overbreadth grounds, to New York's system for screening applicants for admission to the Bar. United Public Workers involved a first amendment challenge to the so-called "Hatch Act," which statute prohibited federal employees from taking "any active part in political management or in political campaigns." Suffice it to say that we have read both cases and are at a loss to determine their relevance to our present inquiry.

[9] To the extent that defendants would invoke the authority of Heim v. McCall, 239 U.S. 175 (1915), and Crane v. New York, 239 U.S. 195 (1915), this Court need only note that—whatever the constitutional status of public employment in 1915—more recent decisions make it clear that the States owe all of their lawful

residents, whether aliens or citizens, equal access to public as well as private employment, absent the necessity for restrictions designed to promote compelling state interests. Sugarman v. Dougall, 413 U.S. 634, 643-45 (1973); Graham v. Richardson, 403 U.S. 365, 370-75 (1971). See Examining Bd. of Engineers, Architects and Surveyors v. Flores de Otero, 44 U.S.L.W. 4890 (U.S. June 17, 1976).

[10] Section 6524(b) required citizenship, or the declared intention to become a citizen, as a condition of retaining a license to practice medicine.

[11] On June 17, 1976, the Supreme Court, reconfirming the standards established by Graham, Sugarman and Griffiths, struck down a Puerto Rico statute that prohibited aliens from engaging in the private practice of engineering. Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, 44 U.S.L.W. 4890 (U.S. June 17, 1976).

It is also noteworthy that Justice Rehnquist, though critical of the rule, recognized in his dissent in Sugarman that

> "[t]he Court in [Sugarman and Griffiths] holds that an alien is not really different from a citizen, and that any legislative classification on the basis of alienage is 'inherently suspect'." *Id.* at 649.

[12] In *In re* Griffiths, 413 U.S. 717 (1973), the Supreme Court noted:

> "We find no merit in the contention that only citizens can in good conscience take an oath to support the Constitution. We note that all persons inducted into the Armed Services, including resident aliens, are required by 10 U.S.C. § 502 to take the following oath:
>
> 'I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.'
>
> If aliens can take this oath when the Nation is making use of their services in the national defense, resident alien applicants for admission to the bar surely connot be precluded, as a class, from taking an oath to support the Constitution on the theory that they are unable to take the oath in good faith." *Id.* at 726 n.18.

[13] On the same day that it decided Sugarman v. Dougall, *supra*, and *In re* Griffiths, *supra*, the Supreme Court summarily affirmed a District of Arizona decision that had invalidated, on equal protection grounds, a State statutory and constitutional scheme excluding aliens from a broad range of public jobs, numbered among which was teaching. Miranda v. Nelson, 351 F.Supp. 735 (1973), *aff'd*, 413 U.S. 902 (1973). Whatever the weight of precedential authority accorded summary affirmances of the Supreme Court, see Hicks v. Miranda, 422 U.S. 332, 343-46 (1975); Fusari v. Steinberg, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring); Edelman v. Jordon, 415 U.S. 651, 671 (1974); Doe v. Hodgson, 478 F.2d 537, 539 (2d Cir.), *cert. denied sub nom.* Doe v. Brennan, 414 U.S. 1096 (1973); Note, Aliens' Right to Teach; Political Socialization and the Public Schools, 85 Yale L.J. 90, 99 n.45 (1975), Miranda's relevance to this case should not be overestimated.

Although one of the named plaintiffs in Miranda was a teacher, the case involved, as noted above, a broad-based challenge to an Arizona policy that precluded aliens from public employment in general. The Miranda defendants' arguments, as well as the court's analysis, centered upon the "special public interest" doctrine. The opinion affirmed by the Supreme Court did not focus upon—or, indeed, allude to—the State's peculiar and particular interests in regulating the teaching profession. Thus, the Supreme Court's summary affirmance in Miranda would provide an unsteady foundation upon which to rest a decision in the present case.

[14] Defendants have taken pains to depict Section 3001(3) as a carefully circumscribed legislative effort to promote continued patriotism among our citizenry. They have chosen to ignore the fact that Section 3001(3) is but one aspect of a rather comprehensive statutory schema, embodied in the Education Law, prohibiting the alien from participation in a broad range of employments—including that of physician (§ 6524), physical therapist (§ 6534), chiropractor (§ 6554), dentist (§ 6604), veterinarian (§ 6704), pharmacist (§ 6805), professional engineer (§ 7206), landscape architect (§ 7324), shorthand reporter (§ 7504), and masseur (§ 7804). The Education Law, however, specifically provides that citizenship is not a qualification for licensure in the following professions: professional and practical nursing (§§ 6904 and 6905), podiatry (§ 7004), optometry (§ 7104), ophthalmic dispensing (§ 7124), architecture (§ 7304), certified public accountancy (§ 7404), psychology (§ 7603) and social work (§ 7704).

APPENDIX B

Order and Judgment of the Three-Judge District Court.

[Entered August 25, 1976]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Based upon the opinion of this Court dated July 20, 1976, and all prior proceedings, it is ORDERED, ADJUDGED AND DECREED:

1. Section 3001(3) of the New York Education Law is hereby declared unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

2. Defendants Ewald Nyquist, Vincent Gazzetta and Thomas Milana, their agents, successors and employees, and all persons having actual notice of this order, are hereby permanently enjoined and restrained from enforcing § 3001(3) of the New York Education Law;

* * * * * *

4. Defendants Ewald Nyquist, Vincent Gazzetta and Thomas Milana are hereby ordered to pay to plaintiffs their reasonable costs to be taxed expended in this action.

Dated: New York, New York
Aug. 23, 1976

WILFRED FEINBERG
Wilfred Feinberg
United States Circuit Judge

LAWRENCE W. PIERCE
Lawrence W. Pierce
United States District Judge

WILLIAM C. CONNER
William C. Conner
United States District Judge

APPENDIX C

Notice of Appeal.

[Filed October 13, 1976]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

SIRS:

PLEASE TAKE NOTICE that the defendants, Ewald Nyquist, individually and as Commissioner of the New York State Education Department, Vincent Gazzetta, individually and as Director of the Division of Teacher Certification of the New York State Education Department, and Thomas Malina, individually and as Acting Director of the Division of Professional Conduct of the New York State Education Department, and their successors in office, hereby appeal to the Supreme Court of the United States from the Order and Judgment of the three judge district court, entered on August 25, 1976, declaring New York Education Law § 3001(3) unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and permanently enjoining its enforcement and from each and every part of that Order and Judgment.

Notice of Appeal.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
October 13, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By JUDITH A. GORDON
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New York, New York 10011

Supreme Court, U. S.
FILED
JUL 26 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA, as Director of the Division of Teacher Education and Certification of the Education Department of the State of New York, and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York,

Appellants,

against

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Jurisdictional Statement Filed December 11, 1976
Probable Jurisdiction Noted May 15, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York, et al.,

Appellants,

against

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor Appellee.

APPENDIX—ERRATA

Page 7, paragraph 13, line 2—
delete "Eduaction" and insert "Education" in place thereof.

Page 34, second paragraph, line 6—
delete "Nores" and insert ~~"inores"~~ in place thereof.

Page 35, second paragraph, line 4—
delete "liimted" and insert "limited" in place thereof.

Page 36, third paragraph, line 8—
delete first "or" and insert "of" in place thereof.

Page 49, note 1, line 3—
insert "hyphen" after "Enter."

Page 51, note 6 (continued), line 3—
delete "3001a-" and insert "3001-a" in place thereof.

Page 53, note 14, line 5—
delete "scheme" and insert "schema" in place thereof.

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Relevant Docket Entries

DATE	PROCEEDINGS
Jun. 27–74	Filed Complaint. Issued Summons.
Jun. 27–74	Filed Affidavit of Michael P. Asen.
Jul. 29–74	Filed summons and return—served the following: Ewald Nyquist by Dr. Fred Goldenberg on 7-10-74 Vincent Gazzetta by Dr. Fred Goldenberg on 7-10-74 Thomas Milana by Dr. Fred Goldenberg on 7-10-74
Aug. 14–74	Filed temporary restraining order on consent—ordered that defts. promptly process pltff's application for provisional teachers certification and refrain from denying said application solely on the ground of pltff's alien status—that this temporary restraining order remain in effect, without the posting of security by pltff, etc. and that the service of a copy of this order upon the office of the Attorney General, etc. on or before 8-15-74 shall be deemed sufficient service hereof. OWEN, J. (m/n)
• • •	
June 13–75	Filed ANSWER of defts. to the complaints.
June 17–75	Filed stip & order that the temporary restraining order now in effect continue until further order of the Court. So ordered—CONNER, J.
Aug. 19–75	Filed pltff's affdvt. and notice of motion for an order to convene a three Judge court.
Aug. 19–75	Filed pltff's memorandum in support of motion to convene a three Judge court.

DATE	PROCEEDINGS
Aug. 19–75	Filed notice of motion for leave to intervene.
Sept. 5–75	Filed Memo Endorsed on Notice of Motion filed 08-19-75 . . . Granted on consent of counsel for defendants. So ORDERED. CONNER, J. (m/n)
Sept. 09–75	Filed Memorandum Decision and Order—Opinion No. 43042 . . . This is an action challenging the constitutionality of Sections 3001 & 3001-a of N.Y. Education Law etc. . . . and for reasons stated Plaintiffs' motion to convene a three-judge court is granted. So ORDERED. CONNER, J. (m/n)
Dec. 24–75	Filed Order—that pltffs' application is set for a hearing on 02-11-76—that pltffs' memoranda and affdvt in support of their application shall be filed on or before 01-09-76. Deft's memoranda and affdvts. in opposition shall be filed on or before 01-19-76. Reply papers should be filed within one week after the filing of defts' answering papers. CONNER, J. (m/n)
Jan. 12–76	Filed pltffs' notice of motion for an order for summary judgment. Ret. 2-11-76.
Jan. 12–76	Filed pltffs' memorandum of law in support of their motion for summary judgment.
Jan. 19–76	Filed defts' memorandum of law in support of constitutionality of New York Education Law Sec. 3001(3) and 3001-a and 8 New York Codes, Rules and Regulations sec. 80.2 (i).
04–26–76	Filed defts' affdvt. of Judith A. Gordon submitted at request of CONNER, J. and constitutes an offer of proof with respect to the witnesses described as indicated.

DATE	PROCEEDINGS
05–06–76	Filed transcript of record of proceedings, dated 2-11-76.
07–20–76	Filed Opinion #44808—for the reasons stated, we conclude that Section 3001(3) is unconstitutional and that its further enforcement must be enjoined. Pltffs' motion for summary judgment is granted. Submit order on notice. FEINBERG, C.J., CONNER, D.J. and PIERCE, D.J. (m/n)
08–24–76	Filed Order and Judgment that Sec. 3001(3) of the N.Y. Education Law is declared unconstitutional that defts Ewald Nyquist, Vincent Gazzetta & Thomas Milana are permanently enjoined and restrained from enforcing Sec. 3001(3) and are ordered to pay to pltffs their reasonable costs to be taxed expended in this action. CONNER, J. JUDGMENT ENTERED: 8-25-76.
10–13–76	Filed defts. and their successors in office notice of appeal . . . from the Order and Judgment of the three-judge District Court entered on 8-25-76. Copy to: Bruce J. Ennis, N.Y. Civil Liberties Union. Ent. 10-13-76.
11–19–76	Filed pltff's notice of entry of order & judgment on 8-24-76.
7–21–78	Filed stip and order amending caption. CONNER, J.

• • •

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2798 (W.C.C.)

VERIFIED COMPLAINT

Three-Judge Court

SUSAN M. W. NORWICK,

Plaintiff,

—against—

EWALD NYQUIST, individually and as Commissioner of the New York State Department of Education,

VINCENT GAZZETTA, individually and as Director of the Division of Teacher Certification, New York State Department of Education, and

THOMAS MILANA, individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education,

Defendants.

JURISDICTION

1. Plaintiff brings this suit pursuant to 42 U.S.C. §§ 1981 and 1983, 28 U.S.C. §§ 1343(3) and (4) 8 U.S.C. §§ 1101 through 1503, the 14th Amendment to the United States Constitution and Article VI of the United States Constitution. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201 *et seq.* Plaintiff also seeks an injunction by

a three judge federal court enjoining the enforcement of state statutes and regulations on the ground that they are unconstitutional, pursuant to 28 U.S.C. 2281 and 2284.

PARTIES

2. Plaintiff Susan M. W. Norwick is a federally registered permanent alien, and maintains a permanent residence at 210 West 89th Street, New York, New York 10024. Plaintiff was born in Dundee, Scotland, and is a citizen of Great Britain. Plaintiff is a graduate, Summa Cum Laude, of North Adams State College, North Adams, Massachusetts, where she received a B.A. degree, and is presently a full-time graduate student working towards an M.S. degree in Developmental Reading at the State University of New York at Albany. Plaintiff has completed 21 credits towards her M.S. degree, with a 4.0 (out of 4.0) grade average, and will complete her M.S. requirements this fall. Plaintiff has been employed (a) from 1967-1972 as a teacher at the Riverside Elementary School, a private school in New York City; (b) from 1965-1967 as an editor of The Reading Laboratory, Lexington Avenue, New York City; (c) from 1961-1965 as a teacher at The Mount School, London, England; and (d) from 1960-1961 as a teacher in primary schools in Edinburgh, Scotland. Plaintiff has been married to a United States citizen, Kenneth P. Norwick, since 1966.

3. Defendant Thomas Milana is sued individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education, 261 Madison Avenue, New York, New York.

4. Defendant Ewald Nyquist is sued individually and as Commissioner of the New York State Department of Edu-

cation. Upon information and belief he maintains an office at 261 Madison Avenue, New York, New York.

5. Defendant Vincent Gazzetta is sued individually and as Director of the Division of Teacher Certification, New York State Department of Education. Upon information and belief he maintains an office at 261 Madison Avenue, New York, New York.

6. At all times relevant herein, defendants have acted, or failed to act, under color of New York State statutes and regulations.

ALLEGATIONS

7. Plaintiff is not subject to conscription by Great Britain, or deportation by the United States.

8. Plaintiff has resided in the United States continuously since 1965.

9. Plaintiff has no plans to leave New York or return to Great Britain.

10. For several years plaintiff has paid income taxes to the City of New York, New York State, and the federal government, and pays real estate taxes on property owned in a tenancy by the entirety with Kenneth P. Norwick in Stockbridge, Massachusetts.

11. Plaintiff is willing to subscribe to an oath to support the Constitution of the State of New York and the United States Constitution, if so required.

12. On November 26, 1973, plaintiff filed with defendants an application for a provisional teacher certificate.

13. By letter dated March 19, 1974, plaintiff received notice from James Rowney, Eduaction Aide to the defendants, and subject to their control, that she met the academic requirements for provisional certification but that Sections 3001 and 3001-a of the New York Education Law and Section 80.2 of the Regulations of the Commissioner of Education require that an applicant for provisional teacher certification be a citizen of the United States, or have filed a Declaration of Intention of United States Citizenship.

14. Plaintiff is required by § 3001 of the Education Law of the State of New York to have a certificate, or a provisional certificate, in order to teach in public schools in New York State. Upon information and belief, plaintiff is required to have either a certificate, or a provisional certificate, in order to teach in most accredited private schools in New York State.

15. Plaintiff is seeking employment to begin this fall as a teacher in a public school, or an accredited private school, in New York State.

16. Plaintiff is in all respects qualified for such employment but will be denied such employment solely because she does not possess a certificate of provisional certification.

17. Plaintiff is in all respects qualified to receive a certificate of provisional certification except for the requirement imposed by Sections 3001 and 3001-a of the New York Education Law and Section 80.2 of the Regulations of the Commissioner of Education of the State of New York, that she be a citizen of the United States, or that she file a Declaration of Intention to become a citizen of the United States.

18. Plaintiff has been denied a certificate of provisional certification solely because of her status as an alien. That denial violates plaintiff's constitutional rights under the equal protection clause of the 14th Amendment to the United States Constitution in that, among other grounds, there is no rational basis for treating plaintiff, a federally registered permanent alien, differently from United States citizens, and no compelling state interest in denying her a certificate of provisional certification solely because of her status as an alien.

19. Defendants have failed and refused to make an individualized determination of plaintiff's competence and ability as a teacher, or of her suitability to receive a certificate of provisional certification. That failure and refusal constitutes a violation of plaintiff's constitutional rights under the Due Process Clause of the 14th Amendment to the United States Constitution.

20. The requirement of sections 3001 and 3001-a of the New York State Education Law, and Section 80.2 of the Regulations of the Commissioner of Education, is in conflict with, and frustrates the implementation of, 8 U.S.C. §§ 1101 through 1503, and is therefore unconstitutional under the Supremacy Clause, Article VI, of the United States Constitution.

WHEREFORE, plaintiff demands judgment:

1. Convening a three-judge federal court pursuant to 28 U.S.C. Sections 2281 and 2284;

2. Declaring Sections 3001 and 3001-a of the New York State Education Law, and Section 80.2 of the Regulations of the Commissioner of Education, to be unconstitutional;

3. Granting a preliminary and permanent injunction restraining defendants from enforcing said sections and requiring defendants to issue a certificate of provisional certification to plaintiff; and

4. Granting plaintiff the costs of this action and such further relief as to the Court seems just and proper.

Dated: New York, New York
June 21, 1974

/s/ BRUCE J. ENNIS
BRUCE J. ENNIS
Attorney for Plaintiff

(Verified by Susan M. W. Norwick on June 21, 1974.)

Affidavit of Bruce J. Ennis in Support of Temporary Restraining Order

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

Bruce J. Ennis, being duly sworn, deposes and says:

1. I am counsel for the plaintiff. This affidavit is submitted pursuant to FRCP 65(b) in support of the attached Temporary Restraining Order.

2. Attached hereto is a copy of the verified complaint, which was served on or about July 10th 1974.

3. Plaintiff Susan M. W. Norwick is seeking employment this fall as a teacher in the New York City School System. In order to gain employment she needs provisional teachers certification.

4. Plaintiff has been denied provisional certification on the grounds that she is a citizen of Great Britain and not of the United States.

5. I have personally discussed this matter with Judith Gordon, Assistant Attorney General and counsel for the defendants, and she has authorized me to state that defendants will consent to the issuance of a Temporary Restraining Order, in the form attached hereto, and will further consent to an extension of the Temporary Restraining Order until this case can be heard on the merits, or until further order of the court.

(Sworn to by Bruce J. Ennis on August 9, 1974.)

Temporary Restraining Order

Based upon the annexed affidavit of Bruce J. Ennis, sworn to August 9, 1974, the verified complaint, and the consent of the attorney for the defendants, Judith Gordon, and pursuant to FRCP 65(b) it is:

1. Ordered, that defendants promptly process plaintiff's application for provisional teachers certification and refrain from denying said application solely on the ground of plaintiff's alien status; and it is further

2. Ordered, that this Temporary Restraining Order remain in effect, without the posting of security by plaintiff, until the action can be heard on the merits, or until further order of this court; and it is further

3. Ordered, that the service of a copy of this order upon the office of the Attorney General, attorney for the defendants, at 2 World Trade Center, New York, New York, on or before August 15, 1974 shall be deemed sufficient service hereof.

/s/ RICHARD OWEN
U.S. District Judge

Dated: New York, New York
August 14, 1974

Issued at 10:35 A.M.

consented to:

Honorable Louis J. Lefkowitz

/s/ JUDITH GORDON
Judith Gordon, Ass't Attorney General

Answer

Defendants, answering the Complaint herein by their attorney Louis J. Lefkowitz, Attorney General of the State of New York, respectfully allege:

FIRST: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "2".

SECOND: Deny so much of paragraphs "3", "4" and "5" as alleges or implies that defendants or any of them are amenable to suit in their individual capacities for the acts complained of herein.

THIRD: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph "7" that plaintiff is not subject to conscription by Great Britain and deny the allegation in paragraph "7" that plaintiff is not subject to deportation by the United States.

FOURTH: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs "8", "9", "10" and "11".

FIFTH: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs "12", "13", "14" and "17" except insofar as the statutes, regulations and documents cited therein provide.

SIXTH: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs "15" and "16".

SEVENTH: Deny each and every allegation in paragraphs "18" and "19" except defendants admit that they have not

made an individual determination of plaintiff's competence to teach different from that required under existing law.

EIGHTH: Deny each and every allegation in paragraph "20".

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A FIRST COMPLETE DEFENSE:

NINTH: The Court lacks jurisdiction over the subject matter of this action.

AS AND FOR A SECOND COMPLETE DEFENSE:

TENTH: The Complaint fails to state a claim for the relief demanded.

AS AND FOR A THIRD DEFENSE:

ELEVENTH: The complaint fails to state a claim against the defendants in their individual capacities, said defendants having acted at all times relevant herein pursuant to and within the scope of their public duties and responsibilities under state statutes and regulations deemed constitutional at the time of the acts challenged.

AS AND FOR A FOURTH DEFENSE:

TWELFTH: The defendants are immune from suit and/or from judgments against them in their individual capacities, said defendants having at all times relevant herein acted in good faith pursuant to and within the scope of their public duties and responsibilities under state statutes and regulations deemed constitutional at the time of the acts challenged.

AS AND FOR A FIFTH DEFENSE:

THIRTEENTH: New York State Education Law §§ 3001, 3001-a and 8 New York Code, Rules and Regulations § 80.2 are valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

AS AND FOR A SIXTH DEFENSE:

FOURTEENTH: New York State Education Law §§ 3001, 3001-a and 8 New York Code, Rules and Regulations § 80.2 are valid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

AS AND FOR A SEVENTH DEFENSE:

FIFTEENTH: New York State Education Law §§ 3001, 3001-a and 8 New York Code, Rules and Regulations § 80.2 are consistent with 8 U.S.C. § 1101 *et seq.* and valid under the Supremacy Clause, Article VI, of the United States Constitution.

AS AND FOR AN EIGHTH DEFENSE:

SIXTEENTH: The Eleventh Amendment bars the award of costs and/or fees against the State of New York, any department, agency or bureau thereof and any officer or employee of said State, department, agency or bureau in his or her official capacity.

AS AND FOR A NINTH DEFENSE:

SEVENTEENTH: No statute authorizes the award of fees against the State of New York, any department, agency

or bureau thereof and any officer or employee of said State, department, agency or bureau in the within action.

WHEREFORE, defendants pray for judgment dismissing the Complaint or, in the alternative, declaring New York Education Law §§ 3001, 3001-a and 8 New York Code, Rules and Regulations § 80.2 valid under the Supremacy Clause and Fourteenth Amendment of the United States Constitution and for such different relief as the Court may find just and proper in the premises.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By
/s/ JUDITH A. GORDON
JUDITH A. GORDON
Assistant Attorney General

(Verified by Judith A. Gordon on June 2, 1975.)

Intervenor's Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2798

VERIFIED COMPLAINT

Three-Judge Court

SUSAN M. W. NORWICK,

Plaintiff,

TARJA U. K. DACHINGER,

Intervenor Plaintiff, —

—against—

EWALD NYQUIST, individually and as Commissioner of the New York State Department of Education,

VINCENT GAZZETTA, individually and as Director of the Division of Teacher Certification, New York State Department of Education, and

THOMAS MILANA, individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education,

Defendants.

JURISDICTION

1. Plaintiff brings this suit pursuant to 42 U.S.C. §§ 1981 and 1983, 28 U.S.C. §§ 1343(3) and (4), 8 U.S.C. §§ 1101 through 1503, the 14th Amendment to the United States

Constitution and Article VI of the United States Constitution. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201 *et seq.* Plaintiff also seeks an injunction by a three judge federal court enjoining the enforcement of state statutes and regulations on the ground that they are unconstitutional, pursuant to 28 U.S.C. 2281 and 2284.

PARTIES

2. Plaintiff Tarja U. K. Dachinger is a federally registered permanent alien, and maintains a permanent residence at 120-19 Coop City Boulevard, Bronx, New York 10475. Plaintiff was born in Turku, Finland, and is a citizen of Finland. Plaintiff is a graduate, Cum Laude, of Lehman (City) College, Bronx, New York, where she received a B.A. degree, major subject German, and an M.S. degree in Early Childhood also at Lehman College of the City University of N.Y.C. Plaintiff has been employed from October 1966-June 1967 and September-December 1970 at the Victory Day Care Center, Bronx, New York, as an assistant teacher and group teacher respectively. Cessation of teaching was due to the rearing of two children, the first of whom was born May 25, 1971. Plaintiff has been married to a United States citizen, Eric S. Dachinger, since 1966.

3. Defendant Thomas Milana is sued individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education, 261 Madison Avenue, New York, New York.

4. Defendant Ewald Nyquist is sued individually and as Commissioner of the New York State Department of Education. Upon information and belief he maintains an office at 261 Madison Avenue, New York, New York.

5. Defendant Vincent Gazzetta is sued individually and as Director of the Division of Teacher Certification, New York State Department of Education. Upon information and belief he maintains an office at 261 Madison Avenue, New York, New York.

6. At all times relevant herein, defendants have acted, or failed to act, under color of New York State statutes and regulations.

ALLEGATIONS

7. Plaintiff is not subject to conscription by Finland, or deportation by the United States.

8. Plaintiff has resided in the United States continuously since 1966, except for Summer visits to Finland.

9. Plaintiff has no plans to leave New York or return to Finland, except for Summer vacations to see family.

10. For several years plaintiff has paid income taxes to the City of New York, New York State, and the federal government, and pays real estate taxes on property owned in a coop apartment by the entirety with Eric S. Dachinger in the Bronx, New York (Coop City).

11. Plaintiff is willing to subscribe to an oath to support the Constitution of the State of New York and the United States Constitution, if so required.

12. In September 1970 plaintiff received a provisional teacher certificate.

13. In April 1975 plaintiff filed with defendants an application for permanent certification.

14. By letter dated April 23, 1975, plaintiff received notice from James Rowney, Education Aide to the defendants, and subject to their control, that she met the academic requirements for permanent certification but "that New York State education law also requires U.S. citizenship for permanent certification."

15. Plaintiff is required by § 3001 of the Education Law of the State of New York to have a certificate or a provisional certificate, in order to teach in public schools in New York State. Upon information and belief, plaintiff is required to have either a certificate, or a provisional certificate, in order to teach in most accredited private schools in New York State.

16. Plaintiff is seeking employment to begin this Fall as teacher in a public school, or an accredited private school, in New York State.

17. Plaintiff is in all respects qualified for such employment but will be denied such employment solely because she will not possess a certificate of provisional certification, which expires September 30, 1975, or permanent certification.

18. Plaintiff is in all respects qualified to receive a certificate of permanent certification except for the requirement imposed by §§ 3001 and 3001-a of the New York Education Law & § 80.2 of the Regulations of the Commissioner of Education of the State of New York, that she be a citizen of the United States, or that she file a Declaration of Intention to become a citizen of the United States.

19. Plaintiff has been denied a certificate of permanent certification solely because of her status as an alien. That

denial violates plaintiff's constitutional rights under the equal protection clause of the 14th Amendment to the United States Constitution in that, among other grounds, there is no rational basis for treating plaintiff, a federally registered permanent alien, differently from United States citizens, and no compelling state interest in denying her permanent certification solely because of her status as an alien.

20. Defendants have failed and refused to make an individualized determination of plaintiff's competence and ability as a teacher or of her suitability to receive a permanent certification. That failure and refusal constitutes a violation of plaintiff's constitutional rights under the Due Process Clause of the 14th Amendment to the United States Constitution.

21. The requirement of §§ 3001 and 3001-a of the New York State Education Law, and § 80.2 of the Regulations of the Commissioner of Education, is in conflict with, and frustrates the implemention of, 8 U.S.C. §§ 1101 through 1503, and is therefore unconstitutional under the Supremacy Clause, Article VI, of the United States Constitution.

WHEREFORE, plaintiff demands judgment:

1. Convening a three-judge federal court pursuant to 28 U.S.C. §§ 2281 and 2284;

2. Declaring §§ 3001 and 3001-a of the New York State Education Law, and §§ 80.2 of the Regulations of the Commissioner of Education, to be unconstitutional;

3. Granting a preliminary and permanent injunction requiring defendants to issue a permanent certificate to plaintiff; and

4. Granting plaintiff the costs of this action and such further relief as to the Court seems just and proper.

Dated: New York, New York
Aug. 26, 1975

/s/ BRUCE J. ENNIS
Bruce J. Ennis
Attorney for Intervenor Plaintiff

(Verified by Tarja U. K. Dachinger on August 26, 1975)

Memorandum and Order Convening Three-Judge Court

CONNER, D. J.:

This is an action challenging the constitutionality of Sections 3001 and 3001-a of the New York Education Law and Section 80.2 of the Regulations of the Commissioner of Education of the State of New York insofar as they are applied to deny plaintiffs, permanent resident aliens, the right to be certified to teach in the public schools solely because of their lack of United States citizenship. Presently under consideration is a motion pursuant to 28 U.S.C. §§ 2181 and 2184 for an order convening a three-judge court to consider plaintiffs' application for an injunction restraining the enforcement of the challenged statutes and regulation. Although not conceding the merit of plaintiffs' claims, defendants have consented to the convening of a three-judge court.

Since the challenged statutes and regulation are of statewide application, state officers are parties defendant, injunctive relief is sought, and it is claimed that the challenged statutes and regulation are violative of the Constitution of the United States, unless the complaint is frivolous, a three-judge court is mandated by 28 U.S.C. §§ 2281 and 2284. Sections 3001 and 3001-a of the Education Law and Regulation 80.2(i) on their face discriminate against certain classes of persons on the basis of alienage. Classifications based on alienage, like those based on nationality and race, are inherently suspect and subject to close judicial scrutiny. *Graham* v. *Richardson*, 403 U.S. 365, 372 (1970); see *In re Griffiths*, 413 U.S. 717, 721 (1973); *Sugarman* v. *Dougall*, 413 U.S. 634, 641-43 (1973). Clearly, this case is not frivolous.

Memorandum and Order

Plaintiffs' motion to convene a three-judge court is granted.

So ORDERED.

/s/ WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
September 9, 1975

Notice of Motion for Summary Judgment

SIRS:

PLEASE TAKE NOTICE THAT, upon the verified complaints, the answer, and Plaintiffs' Statement Pursuant to Rule 9(g) of the Rules of this Court annexed hereto, and pursuant to Rule 56, Fed. R. Civ. Pro., Plaintiffs will move this Court February 11, 1976, at 3:00 p.m., or as soon thereafter as counsel may be heard, in room 318, United States Court House, Foley Square, New York, New York, for summary judgment granting them the relief demanded in their complaints.

Yours, etc.

/s/ BRUCE J. ENNIS
BRUCE J. ENNIS
Attorney for Plaintiffs

To: Hon. Louis J. Lefkowitz
Att.: Judith Gordon, Esq.
Attorney for Defendants

DATED: New York, New York
January 6, 1976

Statement under Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York

Plaintiffs believe there is no genuine dispute with respect to the material facts. Those facts are:

1. Plaintiff Susan M. W. Norwick is a federally registered permanent alien. She is a citizen of Great Britain. She is married to a United States citizen, Kenneth P. Norwick.

2. Intervenor Plaintiff Tarja U. K. Dachinger is a federally registered permanent alien. She is a citizen of Finland. She is married to a United States citizen, Eric S. Dachinger.

3. Defendant Ewald Nyquist is the Commissioner of the New York State Department of Education. Defendant Vincent Gazzetta is the Director of the Division of Teacher Certification, New York State Department of Education. Defendant Thomas Milana is the Acting Director of the Division of Professional Conduct, New York State Department of Education.

4. Except for vacation, plaintiffs Norwick and Dachinger have resided in the United States continuously since 1965 and 1966, respectively.

5. For several years, plaintiffs have paid income taxes to New York City, New York State, and the federal government, and real estate taxes on property owned with their husbands.

6. Plaintiffs are willing to subscribe to an oath to support the Constitution of the State of New York, and the Constitution of the United States, if so required.

Rule 9(g) Statement

7. Plaintiffs are required by § 3001 of the Education Law of the State of New York to have a certificate, or a provisional certificate, in order to teach in public schools in New York State.

8. Except for alienage, plaintiff Norwick is in all respects qualified to receive a certificate, or a provisional certificate. Except for alienage, plaintiff Dachinger is in all respects qualified to receive a certificate. She possesses a provisional certificate, which will expire September 30, 1975.

9. Plaintiff Norwick has applied for, and been denied, a provisional certificate, and plaintiff Dachinger has applied for, and been denied, a certificate. Both denials were issued by defendants, or by persons under their supervision and control, under the color and authority of §§ 3001 and 3001-a of the New York State Education Law, and § 80.2 of the Regulations of the Commissioner of Education of the State of New York (8 NYCRR § 80.2).

/s/ Bruce J. Ennis
Bruce J. Ennis

Dated: New York, New York
January 6, 1976

Letter from Michael B. Rosen to Bruce Ennis

February 6, 1976

Bruce Ennis, Esq.
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

Dear Bruce:

At the request of Kenneth Norwick, I am enclosing a copy of the Circular that was issued by the Chancellor last Spring governing the May, 1975, elections for community school boards in the City School District of the City of New York pursuant to Article 52-a of the Education Law.

As you are aware, the elections are conducted by the New York City Board of Elections. Both the Board of Education and the Board of Elections have interpreted the applicable statute (Educ. Law Section 2590-c) to provide for voting by both registered voters and by parent voters who meet the requirements of the statute, notwithstanding that they are not United States Citizens. The community school board elections which have been held to date have extended the franchise to parent voters regardless of citizenship. To the best of my knowledge, there has been no litigation challenging the eligibility of parent voters to vote in community school board elections.

Our understanding of the legislative history of this provision is that it was the intent of the legislature to extend to parents of children in the New York City public schools the right to vote for the community school boards which would govern the affairs of the schools in which their children were enrolled. The legislature took into account the fact that in New York City there are large numbers of parents who are not registered voters or who are not United States citizens who are interested in and

concerned about the governance of the schools to which they send their children, e.g., to cite two major groups, there are large numbers of parents of Chinese and Dominican origin who are neither citizens nor registered voters.

I trust that this information is responsive to your inquiry.

Very truly yours,

/s/ MICHAEL B. ROSEN
Michael B. Rosen
Counsel to the Chancellor

Special Circular No. 57 (1974-1975) (Excerpts)

ELIGIBILITY TO VOTE

In order to vote in the Community School Board elections a person must be either (a) a registered voter qualified under the elections law, or (b) a parent—or a person acting in the role of a parent—of a child attending a public elementary, intermediate or junior high school who is at least 18 years of age and a city resident for at least 30 days prior to May 6 and who has registered to vote in this election.

A "parent voter" (see *b* above) does not need to be a U.S. Citizen.

Parents of public elementary, intermediate or junior high school children who are registered voters qualified under the elections law may vote either in the district in which they reside or in one community school district in which their children attend school if they register as "parent voters" in that district.

"Parent voters" (those whose children attend a public elementary, intermediate or junior high school and who do not qualify as registered voters under the elections law) may vote only in one community school district in which their children attend school.

Parents of children attending an academic high school, vocational high school or Special School under the jurisdiction of the central Board of Education may qualify only as permanently registered voters under the elections law and may vote as such in the school district of their residence—unless they have children also in a public elementary, intermediate or junior high school in which case they may vote either in the district in which they reside or in the district in which their elementary or junior high school children attend school if they register as "parent voters" in that district.

Permanently registered voters who are not parents as defined above will vote in the community school district in which they reside.

No person may vote more than once. No person may vote in more than one community school district.

Registration—March 19, 21, 22, 1975

Registration of permanent and parent voters will be held in all public elementary schools on four days beginning on Wednesday March 19. From Wednesday through Friday (March 19, 20, 21) registration will be conducted from 12 noon to 8:30 P.M. On Saturday, March 22, the hours will be from 12:00 noon until 6 P.M.

In addition, borough offices of the Board of Elections will register both permanently registered voters and "parent voters" daily from 9 A.M. to 5 P.M. and on Saturdays from 9 A.M. to noon, through April 26. Another opportunity to register permanent voters will be provided in various community school districts by volunteer groups deputized by the Board of Elections to register voters. The volunteers will serve at any time, day and place approved by the Board of Elections through April 7.

"Parent voter" registration by volunteers from Parents Associations and Parents-Teachers Associations which has been going on in some public elementary, intermediate and junior high schools since "Open School Week" in October, 1974 will continue through April 7, except when schools are closed for Spring recess.

Persons already permanently registered for general elections who wish to vote in the community school district in which they reside are not required to re-register for

Community School Board elections. However, persons not already permanently registered as well as parents who have children attending public elementary, intermediate and junior high schools and who are not qualified for permanent registration, must register to vote in the Community School Board elections. "Parent voters" who registered in the 1973 elections must register again.

Nomination of Candidates

A candidate must file a nominating petition containing no fewer than two hundred valid signatures of voters who will be registered as "parent voters" or as permanently registered voters before the expiration of the period for the filing of petitions on April 7.

Petition forms in English and Spanish may be obtained after February 21 without charge from the borough offices of the Board of Elections. See page 2 for addresses. Signing of petitions will take place from February 27 through April 7.

Qualifications for Candidates

Any eligible "parent voter" or any permanently registered voter may be a candidate. A permanently registered voter may be a candidate for the Community School Board of the school district in which he lives or in which his child attends a public elementary, intermediate or junior high school if he or she registers as a "parent voter" in that district. A "parent voter" may be a candidate for the Board of the district in which his or her child attends a public elementary, intermediate or junior high school.

A person elected to a Communty School Board shall be ineligible to be employed by that Community School Board.

• • •

Special Circular No. 57

Special Circular No. 57, 1974-1974 Page 3

BI-LINGUAL TRANSLATORS

The Board of Elections will assign translators at registration desks during registration days, according to the needs of the schools as indicated by an analysis of their student populations. Translators will also be assigned to polling places on election day, May 6, as needed.

PUBLICITY

A publicity campaign will be conducted through all communications media preceding the March registration and the elections in May.

• • •

Very truly yours,

IRVING ANKER
Chancellor

Affidavit of Judith A. Gordon in Opposition to Motion for Summary Judgment

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JUDITH A. GORDON, being duly sworn, deposes and says, that she is the Assistant in the office of Louis J. Lefkowitz, Attorney General of the State of New York, assigned to the defense of the action on behalf of defendants above-named.

This affidavit is submitted at the request of the Hon. William C. Conner and constitutes an offer of proof with respect to the witness described below.

If permitted, defendants will call Dr. Anthony E. Terino, Director of the Division of School Supervision of the New York State Department of Education.

The Division of School Supervision has the responsibility, *inter alia*, of implementing educational standards established by the Education Law, the Board of Regents and the Commissioner of Education in all the elementary secondary schools in the state which come under the jurisdiction of the State Education Department.

Dr. Terino's educational background is in English and Education including school administration. His professional experience includes numerous supervisory positions with the State Education Department, other than his present position, including Associate Superintendent of Secondary Education, Superintendent of Seccondary Education, Superintendent of English. Dr. Terino has been a teacher, assistant principal and principal in private schools. He has been a teacher in public elementary schools and in secondary academic and vocational schools. He has been a Department Chairman and an Assistant Principal in the public schools.

Dr. Terino will testify that teachers in elementary and secondary public schools are in fact required to impart principles of American citizenship to their students. In so

stating, Dr. Terino will rely not only on his own opinion and experience but will cite relevant authorities including, but not limited to, "Cardinal Principles of Secondary Education," *Report of the Commission on the Reorganization of Secondary Education,* Washington, D.C. 1918.

Dr. Terino will be testify that the function of a teacher in the elementary and secondary schools is not in fact limited to imparting particular subject matter but that the teacher serves as a model and example for his students from which they acquire knowledge and are influenced in the formation of their attitudes and behavior patterns. In so stating, Dr. Terino will rely not only on his own experience and opinion but will cite relevant authorities in the field of educational psychology.

In conclusion, Dr. Terino will testify that in his opinion (as well as the evident opinion of the New York State Legislature) aliens who voluntarily refuse naturalization and thereby choose to continue their allegiance to another nation and their identification with the political tradition, culture and Nores of the nation are not appropriate teachers in a curriculum that requires imparting principles of American citizenship.

(Sworn to by Judith A. Gordon on April 23, 1976.)

Opinion of the Three-Judge Court

BEFORE:

WILFRED FEINBERG, United States Circuit Judge, Second Circuit

LAWRENCE W. PIERCE, United States District Judge

WILLIAM C. CONNER, United States District Judge

CONNER, D. J.:

This action represents yet another chapter in the expanding volume of cases involving constitutional challenges to State statutes and regulations designed to limit certain types of employment to citizens, thereby excluding, among others, permanent resident aliens.[1] In the present case, plaintiffs[2] contest the validity of Section 3001(3) of the New York Education Law, which provides that no alien may be employed to teach in the public schools of New York State (the public schools), unless and until that alien has made application to become a United States citizen and thereafter proceeds, in due course, to become a citizen.[3]

Plaintiffs, aliens who have elected to retain their native citizenship (non-applicant aliens), have both applied for certification to teach in the public schools. However, because they do not fit within the liimted exceptions to Section 3001(3), plaintiffs have been denied certification.[4] It is undisputed that, in both cases, the denial of certification has borne no relation to plaintiffs' general character or qualifications, but rather, is solely the product of their status as non-applicant aliens.

On June 27, 1974, plaintiff Norwick commenced this action for injunctive and declaratory relief. She asserts, in addition to other claims, a cause of action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343. With the consent of defendants,[5] the Court entered orders dated September 9,

1975 and December 18, 1975, convening a three-judge constitutional court pursuant to 28 U.S.C. §§ 2281 and 2284 and granting plaintiff Dachinger's motion to intervene.

Presently before the Court is plaintiff's motion, pursuant to Rule 56 F.R.Civ.P., for a summary judgment declaring Section 3001(3) unconstitutional and enjoining its further enforcement.

I.

It is beyond reasonable dispute that the power of New York, or any other state, to promulgate regulatory legislation such as Section 3001(3) is qualified by various provisions of the United States Constitution. In this case, plaintiffs claim that the ban of Section 3001(3)[e] on certification of non-applicant aliens for teaching positions in the public schools offends the Equal Protection and Due Process Clauses of the fourteenth amendment and the Supremacy Clause of Article VI.

We are not insensible of the Supreme Court's admonition that a three-judge court should consider constitutional challenges to State statutes only if non-constitutional "statutory" Supremacy Clause issues, within the jurisdiction of a single judge, prove not to be dispositive. *Hagans* v. *Lavine,* 415 U.S. 528 (1974). Nonetheless, it should be stressed that *Hagans* has neither expanded nor diminished the basic jurisdictional authority or either single-judge or three-judge district courts. To the contrary, the *Hagans* ruling is addressed to procedure only. Thus, the *Hagans* Court, in the interests of judicial economy and in light of " 'the constrictive view of • • • three-judge [court] jurisdiction which [the Supreme Court] has traditionally taken'," concluded and directed that the single judge should exhaust all potentially dispositive claims within his jurisdiction before resort to a three-judge court. Hence, where constitutional claims over which a three-judge court would have

exclusive jurisdiction coincide with non-constitutional claims reviewable by a single judge, *Hagans* directs the single judge, before convention of a three-judge court, to do no more than the latter would itself be required to do, *i.e.,* to dispose of the litigation on non-constitutional grounds, if possible, pursuant to the well settled rule that "a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans* v. *Lavine, supra,* at 546-47.

Typically, the *Hagans* doctrine has been applied to cases in which specific State statutes or regulations are asserted to be in conflict with specific federal statutory or regulatory provisions, *e.g., Holley* v. *Lavine,* 529 F.2d 1294, 1296 (2d Cir. 1976); *Roe* v. *Norton,* 522 F.2d 928 (2d Cir. 1975); *Roe* v. *Ferguson,* 515 F.2d 279 (6th Cir. 1975); *Brown* v. *Beal,* 404 F.Supp. 770 (E.D.Pa. 1975). In such cases, it is the single judge's office merely to "interpret[] the [applicable] statute and • • • regulation," *Holley* v. *Lavine, supra* at 1296, and to determine whether there is a conflict with federal enactments addressed to the same subject matter. It is axiomatic that, should the reviewing judge identify such a conflict, under the Supremacy Clause the State statute must defer to the federal. It was that type of question, resting upon a statutory comparison, that *Hagans* denominated a "Supremacy Clause ('statutory')" issue. *Hagans* v. *Lavine, supra,* at 545. Although, within such a context, a State statute or regulation may be declared "unconstitutional," *i.e.,* violative of the Supremacy Clause, see, *e.g., DeCanas* v. *Bica,* 44 U.S.L.W. 4235, 4236 (U.S. February 25, 1976), the judge can decide the issue without having to interpret the Constitution.

This is a very different case. Here, despite plaintiffs' sweeping citation to the bulk of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., the purported conflict underlying plaintiffs' Supremacy Clause argument is

not between Section 3001(3) and any specific enactment of Congress, but rather, between Section 3001(3) and the exclusive power to regulate immigration and naturalization vested in the federal government by Article 1, Section 8, clause 4 of the United States Constitution. Unlike the clearly "statutory" Supremacy Clause argument in *Hagans,* the Supremacy Clause argument in this case derives exclusively and directly from the Federal Constitution rather than from federal legislation, entails an immediate resort to the Constitution and, if "substantial," see *Goosby* v. *Osser,* 409 U.S. 512, 518 (1973), requires the convention of a three-judge court.

The conclusion that the present Supremacy Clause argument is "constitutional" rather than "statutory" is supported inferentially, by a number of similar cases. Thus, in *Graham* v. *Richardson,* 403 U.S. 365 (1971), the Supreme Court ruled in favor of the alien plaintiffs on *both* equal protection and Supremacy Clause grounds. In *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), the Supreme Court elected to affirm the lower court on equal protection grounds, ignoring the Supremacy Clause argument that had been adopted by the court below. Although these decisions are pre-*Hagans,* they by no means pre-date the doctrine that constitutional rulings are to be avoided whenever possible. More recently, in a post-*Hagans* decision, Judge Gurfein, writing for a three-judge panel in the Eastern District of New York, ruled New York Labor Law Section 222 unconstitutional on both equal protection and Supremacy Clause grounds, *C.D.R. Enterprises, Ltd.* v. *Board of Education of the City of New York,* 75 Civ. 1172 (E.D.N.Y. 1976), without any discussion of *Hagans.*

We therefore believe that the Supremacy Clause claim herein is more properly viewed as a true "constitutional" argument which was thus beyond the convening court's jurisdiction. In any event, the determination whether it is constitutional or statutory is at least sufficiently troublesome that *Hagans'* stated objective of judicial efficiency

would seem better served not by the extensive digression which such determination would require but by proceeding directly to the clearly constitutional equal protection argument which we find dispositive.

For reasons outlined in considerable detail below, this Court concludes that Section 3001(3) violates the Equal Protection Clause of the fourteenth amendment. Thus, plaintiffs' motion for summary judgment must be granted and we need not consider plaintiffs' due process and Supremacy Clause arguments.

II.

At the threshold of any equal protection analysis, a reviewing court must of course identify the standard of judicial scrutiny that is appropriate to the case before it. Under familiar principles, if a regulation impinges upon a "fundamental right," *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), or creates an inherently "suspect classification" such as race, nationality or alienage, the challenged provision will be subjected to "close judicial scrutiny," requiring the State to establish a "compelling interest in its enactment. See, *e.g., Graham* v. *Richardson,* supra, at 372-75 (1971). As the Supreme Court has recently observed, a State that employs

> "a suspect classification, 'bears a heavy burden of justification,' * * *, a burden which, though variously formulated requires [a] State to * * * show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary * * * to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths,* 413 U.S. 717, 721-22 (1973) (footnotes omitted).

If, on the other hand, the regulation does not affect a fundamental right or create a suspect classification, it has tra-

ditionally been accorded a presumption of constitutionality that may not be disturbed unless the enactment is shown to rest on grounds "wholly irrelevant to the achievement of [a legitimate] state [] objective." *McGowan* v. *Maryland,* 366 U.S. 420, 425-26 (1961); see also *Williamson* v. *Lee Optical,* 348 U.S. 483 (1955); *Metropolis Theater Co.* v. *City of Chicago,* 228 U.S. 61 (1913).[7]

In an effort to avoid the "heavy burden" imposed upon those seeking to establish a compelling state interest in a particular legislation, defendants refer us to the several Supreme Court decisions that have measured the constitutionality of a number of state statutes against the more lenient "rational relationship" standard. *Schware* v. *Board of Law Examiners of New Mexico,* 353 U.S. 232, 239 (1957); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955); *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U.S. 552, 556 (1947).[8]

Defendants correctly observe that the cited cases, like that at bar, involve constitutional challenges to State statutes regulating professions or trades invested with a strong public interest. On the basis of that kinship, defendants urge us to adopt here the same standard of review. We cannot do so. The appropriate standard of judicial review is determined, not by the strength of the public interest sought to be protected, but rather by the nature of the right (fundamental or not) being regulated and/or the type of classification (suspect or not) which the regulation creates. Since none of the Supreme Court decisions cited above involved a statute affecting any fundamental right or creating any suspect classification, application of the rational relationship test was there indciated. That is not the situation here.

Ninety years ago, the Supreme Court first ruled that an alien is a "person" entitled to the safeguards afforded by the Due Process and Equal Protection Clauses of the fourteenth amendment. *Yick Wo* v. *Hopkins,* 118 U.S. 356,

369 (1886). See also In re *Griffiths, supra,* at 719-20; *Sugarman* v. *Dougall,* 413 U.S. 634, 641 (1973); *Graham* v. *Richardson, supra,* at 371; *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 420 (1948); *Traux* v. *Raich,* 239 U.S. 33, 39 (1915); *Wong Wing* v. *United States,* 123 U.S. 228, 238 (1896). Those safeguards were subsequently ruled to protect aliens seeking employment "in the common occupation of the community,'" *Traux* v. *Raich, supra,* at 41; *Sugarman* v. *Dougall, supra* at 641. Indeed, the power "to apply [State] laws exclusively to • • • alien[s] • • • as a class [has been steadily] confined within narrow limits." *Takahashi* v. *Fish & Game Commission, supra,* at 420. However, the precise standard for judicial review of statutes creating classifications based on alienage remained undefined until this decade. Finally, in the landmark case of *Graham* v. *Richardson, supra,* the Supreme Court, in striking down a State statute denying welfare benefits to resident aliens, ruled that

> "classifications based on alienage • • • are inherently suspect and subject to close judicial scrutiny." *Id.* at 372.

Writing for the Court, Justice Blackmun observed that

> "[a]liens as a class are a prime example of a 'discrete and insular' minority • • • for whom such heightened judicial solicitude is appropriate." *Id.* at 372.

In subsequent decisions, the Supreme Court has applied the rationale of *Graham* to its review of State statutes foreclosing aliens from a variety of public and non-public jobs.

Thus, in *Sugarman* v. *Dougall, supra,* the Supreme Court considered an equal protection challenge to Section 53 of the New York Civil Service Law, which denied aliens the right to hold positions in New York's "competitive civil service." Section 53 did not survive the *Sugarman* Court's

strict scrutiny. Having indicated that Section 53 was both overinclusive and underinclusive, the Court rested its ruling on the statute's fatal imprecision.

Decided the same day as *Sugarman* was *In re Griffiths, supra,* in which the Supreme Court condemned a Connecticut statute that excluded aliens from the practice of law. Earlier this year, Judge Weinfeld, in striking down Section 6524(b) of New York's Education Law,[10] offered the following précis of the *Griffiths* decision:

> "The Court premised its judgment upon basic constitutional concepts: first, that a lawfully admitted resident alien is a 'person' within the Fourteenth Amendment's prohibition against denial 'to any person within its jurisdiction the equal protection of the laws'; second, that the 'right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure'; third, that 'classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny'; fourth, that a state which adopts a suspect classification 'bears a heavy burden of justification'; and fifth, that 'to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial and that its use is "necessary • • • to the accomplishment" of its purpose or the safeguarding of its interest'." *Surmeli* v. *New York,* 412 F.Supp. 394 (S.D.N.Y. 1976) (footnotes omitted).

It is the opinion of this panel that *Graham, Sugarman* and *Griffiths* establish, beyond peradventure, that any challenged State statute or regulation placing aliens, as a class, at a disadvantage vis-à-vis citizens must withstand the rigors of close judicial scrutiny.[11] Thus, the deprivation protested by plaintiffs herein can be justified only if Section 3001(3) is shown to be a *necessary* implement of a *compelling* state interest. We "therefore look to the substantiality of the State's interest in enforcing [Section 3001(3)], and to the narrowness of the limits within which the discrimination is confined." *Sugarman* v. *Dougall, supra,* at 642.

III.

In attempted justification of Section 3001(3), defendants assert that, "Given the vital role of the educational system in the American democracy," the State has a compelling interest in the assurance that those who minister to the educational needs of its young are qualified, both by profession and example, to transmit the American heritage to their students. Thus, defendants argue, in furtherance of this interest,

> "it • • • does not offend the equal protection rights of aliens to require that in order to obtain teaching positions within that system, they act, affirmatively to identify themselves with that democracy. By obtaining declarant status (and timely completing the naturalization process), the alien has provided objective evidence that he in fact believes in the American heritage which he in turn is obliged to transmit to his students."

Defendants urge that the State-required oath of allegiance, in which plaintiffs expressly stand ready to join, is an inadequate badge of identification with the United States.[12] Section 3001(3), defendants conclude, "is certainly an appropriate if not the 'least drastic means' for effectuating" the interest it was enacted to support.

To be sure, a "teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds

towards the society in which they live. In this, the State has a vital concern." *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952). Accordingly, "[t]here can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools * * *," *Shelton* v. *Tucker,* 364 U.S. 479, 485 (1965) (footnote omitted), and there is "no requirement * * * that a teacher's classroom conduct be the sole basis for determining * * * fitness." *Beilan* v. *Board of Education,* 357 U.S. 399, 406 (1958). Moreover, in a somewhat different context, the Supreme Court has acknowledged that the "State's broad power to define its political community" might include "requir[ing] citizenship" in "an appropriately defined class of positions." *Sugarman* v. *Dougall, supra,* at 642-43, 646-47.

Thus aware that the Supreme Court has recognized a strong nexus between the classroom and the political community and that it has at least intimated its approval of citizenship requirements for jobs bearing a relationship to the State's ability to "define its political community," one might infer that teaching fits within the narrow area of allowable discrimination discussed in Sugarman.[13]

This Court must be no less aware, however, of *Sugarman's* ultimate stricture: when a State seeks to vindicate even a compelling interest, through discrimination, "the means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.* at 653. Even if Section 3001(3) had safely negotiated all of the other shoals, on this rock it clearly founders.

Defendants have attempted to justify the sweeping breath of Section 3001(3) by exhuming an argument laid to rest in *Griffiths* and *Sugarman,* contrasting the undivided allegiance which a citizen presumptively bears to this country with a resident alien's potential conflict of loyalties. On the basis of this supposed conflict, defendants

would have us conclusively presume that all those who elect not to seek U.S. citizenship, regardless of their nation of birth, the academic subject they seek to teach, the nature and strength of their ties to this country or their willingness to pledge allegiance to it, are unqualified for such responsibilities.

The Supreme Court rejected a like "undivided allegiance" argument advanced by the defendants in *Sugarman* because, in that case,

> "the State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose.
>
> • • • •
>
> [Section 53's] imposed ineligibility may apply to the 'sanitation man, class B,' Perotta v. Gregory, 4 Misc. 2d 769, 158 N.Y.S. 2d 221 (1957), to the typist, and to the office worker, as well as to the person who directly participates in the formulation and execution of important state policy. The citizenship restriction sweeps indiscriminately." *Id.* at 642-42.

As with the statute challenged in *Sugarman,* Section 3001(3) is damned by its imprecision. It excludes *all* nonapplicant aliens, regardless of nationality, from *all* teaching positions in the public school system, regardless of grade level or subject matter.[14] It thus bars British subjects seeking certification to teach mathematics or physical education as well as Soviet citizens seeking to teach civics or economics. The statute's imprecision becomes even more glaring when one considers that the prohibition does not extend to those who teach the thousands of New York children attending private schools. Indeed, even in the public schools, under an amorphous exception to Section

3001(3), the State would permit a non-applicant alien to obtain certification to teach certain subjects requiring "skills or competencies not readily available among teachers holding citizenship."

In *Griffiths,* the undivided allegiance argument was labeled "unconvincing" and the Supreme Court declared the possibility that some aliens might be unsuited to a particular profession no "justification for a wholesale ban." *Id.* at 725; *cf. Hampton* v. *Mow Sun Wong,* 44 U.S.L.W. 4737, 4745 (U.S. June 1, 1976). The applicability of the reasoning of *Griffiths* to the statute challenged here is apparent from the following quotation from that opinion, substituting appropriate references to the State and profession involved:

> "Although, as we have acknowledged, a State does have a substantial interest in the qualifications of those [certified to teach in the public schools], the arguments advanced by the [defendants] fall short of showing that the classification established by [Section 3001(3)] is necessary to the promoting or safeguarding of this interest. [New York] has wide freedom to gauge on a case-by-case basis the fitness of an applicant to [teach]. * * * [New York] can * * * require appropriate training and familiarity with [the subject matter to be taught]. Apart from such tests of competence, it requires a new [teacher] to take [an oath] to 'support the constitution of the United States, and the constitution of the State of [New York].' [Plaintiffs have] indicated [their] willingness and ability to subscribe to the * * * oath[], and [New York] may quite properly conduct a character investigation to insure in any given case 'that an applicant is not one who 'swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath.'' *Bond* v. *Floyd,* 385 U.S. 116, 132.' *Law Students Research Council* v. *Wadmond,* 401 U.S. at 164. Moreover, [teachers] are subject to continuing scrutiny by [their superiors] * * *. In sum, [defendants] simply [have] not established that [the State] must exclude all aliens from the [teaching profession] in order to vindicate its undoubted interest * * *.'' In re *Griffiths, supra,* at 725-26 (footnotes omitted).

The question remains whether, via an evidentiary hearing, the State might establish a necessary connection between. Section 3001(3) and the public interest herein involved. In this context, and at the request of the Court, defendants' counsel has submitted, in affidavit form, an offer of proof requesting an opportunity to call Dr. Anthony E. Terino, Director of the Division of School Supervision of the New York State Department of Education. It is represented that Dr. Terino would testify that 1) teachers are required to convey principles of American citizenship to their students; 2) the function of a teacher is not limited to imparting particular subject matter; the teacher also serves as an example for his students "from which they acquire knowledge and are influenced in the formation of their attitudes and behavior patterns" and 3) aliens who voluntarily refuse naturalization "are not appropriate teachers in curriculum that requires imparting principles of American citizenship."

In our opinion, the further delay that would be occasioned by an evidentiary hearing would be unjustified. It is inconceivable that defendants could establish, on the basis of the proposed testimony of Dr. Terino, that a broad exclusion of *all* non-applicant aliens from *all* teaching positions is necessary to the advancement of New York's claimed interest.

No doubt teachers and their students may engage in exchanges reaching beyond the scope of a particular course of instruction. Nevertheless, defendants' position that, regardless of his other attributes, the non-applicant alien's

voluntary decision to retain his native citizenship necessarily renders him, by example, a negative influence, and thus inherently unqualified to teach, is unsupported by anything in the present record. Nor would such a conclusion be supported by the proposed testimony of Dr. Terino. Indeed, New York's attempt to exclude all non-applicant aliens from its academic community seems repugnant to the very heritage the State is seeking to inculcate. As the Supreme Court recognized, albeit in a somewhat different context, statutes which "cast a pall of orthodoxy over the classroom" are ultimately destructive.

> "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues [rather] than through any kind of authoritative selection.'" *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). (citations omitted).

We conclude that Section 3001(3) is unconstitutional and that its further enforcement must be enjoined.

Plaintiffs' motion for summary judgment is granted.

Submit order on notice.

Dated: New York, New York, July 20, 1976.

FOOTNOTES

[1] See, *e.g.*, *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Foley* v. *Connelie*, 75 Civ. 4548 (S.D.N.Y. July 8, 1976); *Surmeli* v. *New York*, 75 Civ. 4520 (S.D.NY. April 7, 1976); *C.D.R. Enterprises, Ltd.* v. *Board of Education of the City of New York*, 75 Civ. 1172 (E.D.N.Y. March 1976); *Mauclet* v. *Nyquist*, 75 Civ. 73 (E.D.NY. February 11, 1976).

[2] Plaintiff Susan M. W. Norwick was born in Dundee, Scotland and is a British subject. Married to a United States citizen, she is a federally registered resident alien and has resided in this country since 1965. Ms. Nowick is a graduate of North Adams State College in Massachusetts, where she received a B.A. degree *summa cum laude*. She is presently a full-time graduate student in Development Reading at the State University of New York at Albany, where she has compiled a straight A average. Since 1960, Ms. Norwick has been periodically employed as a teacher both in this country and in Great Britain.

Intervenor-plaintiff Tarja U. K. Dachinger was born in Turku, Finland and remains a citizen of that country. Ms. Dachinger majored in German at Lehman College, from which she received a B.A degree *cum laude* and an M.S. degree in Early Childhood Education. She is married to a U.S. citizen and has resided in this country since 1966.

[3] Section 3001(3) provides, *inter alia*:

> "No person shall be employed or authorized to teach in the public schools of this state who is:
>
> • • •
>
> 3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien [who] make[s] due application to become a citizen and thereafter within the time prescribed by law shall become a citizen.

[4] The only exceptions to Section 3001(3) are contained in Section 3001-a of the New York Code of Rules and Regulations.

New York Education Law § 3001a- provides:

> "A person, not a citizen, who files with the department satisfactory proof that he has filed with the attorney general of the United States a first preference petition pursuant to section two hundred three (a) (1) of the immigration and nationality act [8 U.S.C.A. § 1153(a) (1)] and that said petition has been approved by such attorney general upon certification by the department of justice, immigration and naturalization service, that he is unable to adjust his status to that of

a lawful permanent resident of the United States solely because of an over-subscribed quota to which he is chargeable may receive from the commissioner of education, notwithstanding the provisions of subdivision three of section three thousand one of this chapter, a temporary permit validating his employment in a teaching capacity in the public schools of the state. Such temporary permit shall be valid for one year from the date of issue and may, upon proper application to the commissioner, be once renewed for a further period of one year. Such application shall be in the form required by the commissioner. Such applicant shall not be employed until he shall have taken and subscribed the following oath or affirmation:

'I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of . . . (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned.' The affidavit and oath required by this section shall be administered by the superintendent of schools having jurisdiction over the school district in which such person is to be employed or his duly authorized representative and shall be filed with the commissioner of education. Copies thereof shall be filed with the superintendent of schools."

Section 80.2(i) of 8 New York Code of Rules and Regulations provides:

> *"Citizenship.* A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the approprite educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons.

[5] The individual defendants, public officials serving within the New York State Department of Education, are responsible for the implementation and enforcement of the statutes and reguration challenged herein.

[6] Although the complaints filed in this action refer to "Sections 3001 and 3001-a of the New York Education Law and Section 80.2 of the Regulations of the Commissioner of Education of the State of New York," it is clear that a ruling on the constitutionality of

Section 3001(3) will be dispositive of this entire case. None of the other subdivisions of Section 3001 has been challenged in this action. Sections 3001a- and 80.2(i), which provide limited exceptions to Section 3001(3), are challenged only to the extent that as exceptions to a disallowance they might imply the existence of a disallowance. This Court need only note that, should we find it necessary to invalidate Section 3001(3), Sections 3001-a and 80.2(i) could not conceivably operate to deny plaintiffs the certification they require to teach. Accordingly, we restrict our review to Section 3001(3). See *In re Griffiths*, 413 U.S. 717, 726 n. 17 (1973).

[7] In recent years, the Supreme Court has apparently been less willing to accord even those statutes involving non-fundamental, non-suspect categories the virtually automatic approval that such legislation had historically enjoyed The Court has indicated that a statute creating any classification must at least "be reasonable, not arbitrary, and must rest upon some ground or difference having a *fair and substantial* relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed*, 404 U.S 71, 76 (1971) (emphasis added).

See generally Gunther, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine of a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L. Rev. 1 (1972); Note, Legislative Purpose, Rationality and Equal Protection, 82 Yale L.J. 123 (1972) See also *Massachusetts Bd of Retirement* v. *Murgia*, 44 U.S.L.W. 5077, 5081 (U.S. June 25, 1976) (Marshall, J., dissenting).

[8] Defendants also direct the Court to *Law Students Research Council* v. *Wadmond*, 401 U.S. 154 (1971) and *United Public Workers of America* v. *Mitchell*, 330 U.S. 75 (1947). In *Wadmond*, the Supreme Court considered a challenge, on first amendment vagueness and overbreadth grounds, to New York's system for screening applicants for admission to the Bar. *United Public Workers* involved a first amendment challenge to the so-called "Hatch Act," which statute prohibited federal employees from taking "any active part in political management or in political campaigns." Suffice it to say that we have read both cases and are at a loss to determine their relevance to our present inquiry.

[9] To the extent that defendants would invoke the authority of *Heim* v. *McCall*, 239 U.S. 175 (1915), and *Crane* v. *New York*, 239 U.S. 195 (1915), this Court need only note that—whatever the constitutional status of public employment in 1915—more recent decisions make it clear that the States owe all of their lawful residents, whether aliens or citizens, equal access to public as well as private employment, absent the necessity for restrictions

designed to promote compelling state interests. *Sugarman* v. *Dougall*, 413 U.S. 634, 643-45 (1973); *Graham* v. *Richardson*, 403 U.S. 365, 370-75 (1971). See *Examining Bd. of Engineers, Architects and Surveyors* v. *Flores de Otero*, —— U.S. ——, 96 S. Ct. 2264, 49 L.Ed. 2d 65 (1976).

[10] Section 6524(b) required citizenship, or the declared intention to become a citizen, as a condition of retaining a license to practice medicine.

[11] On June 17, 1976, the Supreme Court, reconfirming the standards established by *Graham*, *Sugarman* and *Griffiths*, struck down a Puerto Rico statute that prohibited aliens from engaging in the private practice of engineering. *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, —— U.S. ——, 96 S. Ct. 2264, 49 L.Ed. 2d 65 (1976).

It is also noteworthy that Justice Rehnquist, though critical of the rule, recognized in his dissent in *Sugarman* that

> "[t]he Court in [*Sugarman* and *Griffiths*] holds that an alien is not really different from a citizen, and that any legislative classificaiton on the basis of alienage is 'inherently suspect'." *Id.* at 649.

[12] In *In re Griffiths*, 413 U.S. 717 (1973), the Supreme Court noted:

> "We find no merit in the contention that only citizens can in good conscience take an oath to support the Constitution. We note that all persons inducted into the Armed Services, including resident aliens, are required by 10 U.S.C. § 502 to take the following oath:
>
> 'I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.
>
> If aliens can take this oath when the Nation is making use of their services in the national defense, resident alien applicants for admission to the bar surely cannot be precluded, as a class, from taking an oath to support the Constitution on the theory that they are unable to take the oath in good faith." *Id.* at 726 n.18.

[13] On the same day that it decided *Sugarman* v. *Dougall*, *supra*, and *In re Griffiths*, *supra*, the Supreme Court summarily affirmed a District of Arizona decision that had invalidated, on equal

protection grounds, a State statutory and constitutional scheme excluding aliens from a broad range of public jobs, numbered among which was teaching. *Miranda* v. *Nelson*, 351 F.Supp. 735 (1973), *aff'd*, 413 U.S. 902 (1973). Whatever the weight of precedential authority accorded summary affirmances of the Supreme Court, see *Hicks* v. *Miranda*, 422 U.S. 332, 343-46 (1975); *Fusari* v. *Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974); *Doe* v. *Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied sub nom. Doe* v. *Brennan*, 414 U.S. 1096 (1973); Note, Aliens' Right to Teach; Political Socialization and the Public Schools, 85 Yale L.J. 90, 99 n.45 (1975), *Miranda's* relevance to this case should not be overestimated.

Although one of the named plaintiffs in *Miranda* was a teacher, the case involved, as noted above, a broad-based challenge to an Arizona policy that precluded aliens from public employment in general. The *Miranda* defendants' arguments, as well as the court's analysis, centered upon the "special public interest" doctrine. The opinion affirmed by the Supreme Court did not focus upon—or, indeed, allude to—the State's peculiar and particular interests in regulating the teaching profession. Thus, the Supreme Court's summary affirmance in *Miranda* would provide an unsteady foundation upon which to rest a decision in the present case.

[14] Defendants have taken pains to depict Section 3001(3) as a carefully circumscribed legislative effort to promote continued patriotism among our citizenry. They have chosen to ignore the fact that Section 3001(3) is but one aspect of a rather comprehensive statutory scheme, embodied in the Education Law, prohibiting the alien from participation in a broad range of employments—including that of physician (§ 6524), physical therapist (§ 6534), chiropractor (§ 6554), dentist (§ 6604), veterinarian (§ 6704), pharmacist (§ 6805), professional engineer (§ 7206), landscape architect (§ 7324), shorthand reporter (§ 7504), and masseur (§ 7804). The Education Law, however, specifically provides that citizenship is not a qualificaion for licensure in the following professions; professional and practical nursing (§ 6904 and 6905), podiatry (§ 7004), optomery (§ 7104), ophthalmic dispensing (§ 7124), architecture (§ 7304), certified public accountancy (§ 7404, psychology (§ 7603) and social work (§ 7704).

Order and Judgment

Based upon the opinion of this Court dated July 20, 1976, and all prior proceedings, it is ORDERED, ADJUDGED AND DECREED;

1. Section 3001(3) of the New York Education Law is hereby declared unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

2. Defendants Ewald Nyquist, Vincent Gazzetta and Thomas Milana, their agents, successors and employees, and all persons having actual notice of this order, are hereby permanently enjoined and restrained from enforcing § 3001(3) of the New York Education Law;

• • •

4. Defendants Ewald Nyquist, Vincent Gazzetta and Thomas Milana are hereby ordered to pay to plaintiffs their reasonable costs to be taxed expended in this action.

Dated: New York, New York
Aug. 23, 1976

/s/ WILFRED FEINBERG
Wilfred Feinberg
United States Circuit Judge

/s/ LAWRENCE W. PIERCE
Lawrence W. Pierce
United States District Judge

/s/ WILLIAM C. CONNER
William C. Conner
United States District Judge

Judgment entered
8/25/76
/s/ Raymond F. Burghardt
Clerk

Notice of Appeal

SIRS:

PLEASE TAKE NOTICE that the defendants Ewald Nyquist, individually and as Commissioner of the New York State Education Department, Vincent Gazzetta, individually and as Director of the Division of Teacher Certification of the New York State Education Department, and Thomas Malina, individually and as Acting Director of the Division of Professional Conduct of the New York State Education Department, and their successors in office, hereby appeal to the Supreme Court of the United States from the Order and Judgment of the three judge district court, entered on August 25, 1976, declaring New York Education Law § 3001(3) unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and permanently enjoining its enforcement and from each and every part of that Order and Judgment.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
October 13, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By /s/ JUDITH A. GORDON
Judith A. Gordon
Assistant Attorney General
Attorney for Defendants

To: BRUCE J. ENNIS, Esq.
Attorney for Plaintiffs

(Filed October 13, 1976.)

Supreme Court, U. S.
FILED
JAN 10 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-808

EWALD NYQUIST, individually and as Commissioner of the New York State Department of Education,

VINCENT GAZZETTA, individually and as Director of the Division of Teacher Certification, New York State Department of Education, and

THOMAS MILANA, individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education,

Appellants,

-against-

SUSAN M.W. NORWICK,

Appellee,

TARJA U.K. DACHINGER,

Intervenor-Appellee.

On Appeal From The United States District Court For the Southern District of New York

MOTION TO AFFIRM

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In The

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OCTOBER TERM, 1976

No.
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EWALD NYQUIST, individually and as Commissioner of the New York State Department of Education,

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Appellee,

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Intervenor-Appellee.

On Appeal From The United States District Court For the Southern District of New York

---

MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16 (1) (c), appellees move to affirm the unanimous Order and Judgment of the court below, entered on August 25, 1976, on the grounds that it is manifest that the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

STATEMENT OF THE CASE

Appellees have no substantial quarrel with the statement of the case contained in the Jurisdictional Statement. For purposes of this motion, however, they wish to emphasize pertinent facts found by the court below and noted in its opinion.

"Section 3001(3) of the New York Education Law. . .provides that no alien may be employed to teach in the public schools of New York State. . .unless and until that alien has made application to become a United States citizen and thereafter proceeds, in due course, to become a citizen" (Opinion, p. 2a).

Appellees are lawfully admitted permanent resident aliens. They have been denied the certificates they must possess in order to teach in public schools in New York State solely because they are aliens who have decided not to apply at this time for United States citizenship (non-applicant aliens). Except for alienage, they are in all respects (including English language facility, character, educational background and professional competence) qualified to receive the necessary certificates. "It is undisputed that, in both cases, the denial of certification has borne no relation to plaintiffs' general character or qualifications, but rather, is solely the product of their status as non-applicant aliens" (Opinion, pp. 2a-3a).

Appellee Norwick is a citizen of Great Britain; appellee Dachinger is a citizen of Finland (Opinion, footnote 2, p. 17a). Appellees are both married to United States citizens and both have resided in the United States for over ten years (Opinion, id.). Appellees graduated with B.A. degrees summa cum laude and cum laude from American colleges (id). Appellee Dachinger has received an M.S. degree in Early Childhood Education from Lehman College, a division of the College of the City of New York (Opinion, id), and appellee Norwick has received an M.S. degree in Developmental Reading from the State University of New York, where she compiled a straight A average.

New York requires that all public school teachers, including citizens and applicant aliens, take an oath to support the constitutions of the United States and of New York. Appellees can in good faith take that oath, and have expressly offered to do so (Opinion, p. 11a).

The challenged statute "excludes all non-applicant aliens, regardless of nationality, from all teaching positions in the public school system, regardless of grade level or subject matter" (Opinion, p. 13a; emphasis in original). But "the prohibition does not extend to those who teach the thousands of New York children attending private schools. Indeed, even in the public schools, under an amorphous exception to Section 3001(3), the State would permit a non-applicant alien to obtain certification to teach certain subjects requiring 'skills or competencies not

readily available among teachers holding citizenship'" (Opinion, p. 13a).

"Section 3001(3) is but one aspect of a rather comprehensive statutory schema, embodied in the Education Law, prohibiting the alien from participation in a broad range of employments--including that of physician (§ 6524), physical therapist (§ 6534), chiropractor (§ 6554), dentist (§ 6604), veterinarian (§ 6704), pharmacist (§ 6805), professional engineer (§ 7206), landscape architect (§ 7324), shorthand reporter (§ 7504), and masseur (§ 7804). The Education Law, however, specifically provides that citizenship is not a qualification for licensure in the following professions: professional and practical nursing (§§ 6904 and 6905), podiatry (§ 7004), optometry (§ 7104), ophthalmic dispensing (§ 7124), architecture (§ 7304), certified public accountancy (§ 7404), psychology (§ 7603) and social work (§ 7704)" (Opinion, footnote 14, p. 21a).

ARGUMENT

I. THE QUESTIONS RAISED ARE SO INSUBSTANTIAL THAT THEY DO NOT REQUIRE FURTHER ARGUMENT.

A. The Decision Below Was Compelled By This Court's Decision in Miranda v. Nelson.

This case is indistinguishable from Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972), aff'd mem., 413 U.S. 902 (June 25, 1973). In Miranda, a three-judge court held unconstitutional on equal protection grounds an Arizona statutory scheme which, like the New York Education Law, excluded aliens from a broad range of public jobs, including teaching. One of the two plaintiffs in Miranda was specifically seeking employment as a teacher. The three-judge court found no state interest compelling enough to deny that employment to aliens, and this Court summarily affirmed.

B. The Decision Below Was Compelled By This Court's Decisions In Other Cases Involving Employment Discrimination Against Permanent Resident Aliens.

1. The challenged statute was properly reviewed under a heightened equal protection test.

Appellants contend that the court below mistakenly reviewed the challenged statute "under a heightened equal protection test" and argue that the standard of review should have been whether there was a "reasonable relation to a legitimate state

interest" (Jurisdictional Statement, pp. 3, 6). That contention is plainly insubstantial.

In Graham v. Richardson, 403 U.S. 365, 371-372 (1971), this Court ruled that "classifications based on alienage. . .are inherently suspect and subject to close judicial scrutiny." In In Re Griffiths, 413 U.S. 717 (1973), this Court ruled that "in order to justify the use of a suspect classification, a state must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary. . .to the accomplishment' of its purpose or the safeguarding of its interest. . . .It is appropriate that a state bear a heavy burden when it deprives [resident aliens] of employment opportunities" (413 U.S. at 721-722, footnotes omitted). The propriety of this "heightened" or "strict scrutiny" standard of review in alien employment cases has recently been confirmed in Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, ___U.S.___, 49 L. Ed. 2d 65 (1976). See, to the same effect, Sugarman v. Dougall, 413 U.S. 634 (1973).*

*Indeed, for over ninety years this Court has been particularly sensitive to employment discrimination against resident aliens. See, Yick Wo v. Hopkins, 118 U.S. 356 (1886); Truax v. Raich, 239 U.S. 33 (1915); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

Appellants contend that because they do not discriminate against applicant aliens (whom they deem the equivalent of citizens), their discrimination against non-applicant aliens should be reviewed under a lower standard of review. The only authority cited for that contention is Mathews v. Diaz, ___U.S.___, 48 L. Ed. 2d 478 (1976). Mathews is not in point. The statute at issue did not distinguish between applicant and non-applicant aliens, but between aliens who had resided in the United States for five years and those who had not. And as the Court expressly noted, it was a federal statute, and was thus properly reviewed under a lower standard of review than would have been applicable to review of a similar state statute (48 L. Ed. 2d at 490-494). See, to the same effect, Hampton v. Mow Sun Wong, ___U.S.___, 48 L. Ed. 2d 495 (1976).

Accordingly, the standard applied below was correct and raises no issue requiring review by this Court.

2. The challenged statute was not narrowly drawn and was not necessary to promote a compelling governmental interest.

Appellants' claim that the challenged statute "establishes a narrow limitation" (Jurisdictional Statement, p. 9) is plainly insubstantial. As the court below noted, the challenged statute is part of a "comprehensive statutory schema. . . prohibiting the alien from participation in a broad range of employments," including veterinarian and masseur (Opinion, footnote 14, p. 21a). And the statute

prohibits aliens from any country from teaching any course, at any grade level (Opinion, p. 13a). A Canadian citizen could not teach metal-working; a British citizen could not teach math; a French citizen could not teach French.

Furthermore, the interest which the challenged statute purports to serve is not at all "compelling" and is practically nonexistent:

(a) The challenged statute applies only to teachers in public schools. If the New York legislature had considered citizenship to be an essential requirement for teaching, it could have made that requirement applicable to those who teach the thousands of New York children attending private or parochial schools. But it did not.

(b) The challenged statute provides that its citizenship requirement "shall not apply" after July 1, 1967 to alien teachers employed pursuant to whatever regulations the Commissioner of Education, appellant Nyquist, chooses to adopt. Should appellant Nyquist decide tomorrow to adopt a regulation permitting aliens to teach in public schools, or in certain grade levels, or in certain subject areas, no state statute, and no state interest, would preclude him from doing so.

(c) As the court below noted, current statutes and regulations permit "exceptions" to the citizenship requirement under which some non-applicant aliens are permitted to teach in public schools (Opinion, p. 13a, and footnote 4, p. 17a).

(d) Although it is not evident from the opinion below, appellants conceded

below that New York Education Law sections 2590-c(3) and (4), which require state citizenship but not national citizenship, permit alien parents to vote in public school board elections and to sit as elected members of such boards. Those boards are authorized by statute (Education Law section 2590-e) to hire and fire teachers, select textbooks and make the kinds of policy decisions teachers cannot and do not make. It is frivolous to contend that New York has a "compelling" interest in barring alien teachers from public schools when New York law permits aliens to run those very schools.

CONCLUSION

The Order and Judgment of the Court Below Should Be Affirmed.

Respectfully submitted,

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*Appellees wish to express their appreciation to Wendy Benjamin, a third-year law student, for assistance in the research and preparation of this motion to affirm.

To be argued in the October Term, 1978

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA, as Director of the Division of Teacher Education and Certification of the Education Department of the State of New York, and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York,

Appellants,

against

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York, et al.,

Appellants,

against

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor Appellee.

APPELLANTS' BRIEF—ERRATA

Page i, line 3—
delete "Staute" and insert "Statute" in place thereof.

Page 5, second paragraph, line 20—
delete "Appellees'" and insert "Appellants'" in place thereof.

Page 10, line 18—
insert quotation marks after "taught."

Page 18, first paragraph, line 14—
delete "of" and insert "or" in place thereof.

Page 26, second paragraph, line 16—
insert "hyphen" between "N" and "9."

Page 27, first footnote, line 2—
insert "8" after "E.g."

Page 33, closing—
delete "State of New York Attorney General of the" and insert "Attorney General of the State of New York" in place thereof.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA, as Director of the Division of Teacher Education and Certification of the Education Department of the State of New York, and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York,

Appellants,

against

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

The Commissioner of Education of the State of New York and the Directors of the Division of Teacher Education and Certification and of the Division of Professional Conduct of the Education Department appeal from an Order and Judgment of a three-judge district court entered in the Southern District of New York on August 25, 1976

(A. 54†). The Order and Judgment declared New York Education Law § 3001(3) unconstitutional and permanently enjoined its enforcement on the ground that the statute's exclusion of aliens who had not applied for citizenship from the class of individuals eligible for permanent teaching certificates denied the excluded aliens equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

Opinions Below

The opinion of the three-judge district court (A. 35-A. 53) is reported at 417 F. Supp. 913.

The memorandum and order of the single district judge convening the three-judge court (A. 22-A. 23) is not reported.

Jurisdiction

The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

The Order and Judgment of the three-judge district court (A. 54) was entered on August 25, 1976. The Notice of Appeal (A. 55) was filed on October 13, 1976. The Jurisdictional Statement was filed on December 11, 1976, and probable jurisdiction was noted on May 15, 1978.

State Statute Involved

New York Education Law § 3001 states in part:

"QUALIFICATIONS OF TEACHERS

"No person shall be employed or authorized to teach in the public schools of this state who is:

* * *

† References preceded by the letter "A" refer to the Appendix filed on this appeal.

"3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply, after July first, nineteen hundred sixty-seven, to an alien teacher employed pursuant to regulations adopted by the commissioner of education permitting such employment."

New York Education Law ("Education Law") § 3001-a, portions of Education Law § 3005, and 8 New York Codes, Rules and Regulations ("NYCRR") § 80.2(i) are set forth in the Appendix to this brief, pp. 1a-2a.

Questions Presented

1. Should Education Law § 3001(3) be closely scrutinized because it limits permanent certification of public school teachers to citizens and aliens who have applied for citizenship?

2. Does the classification established by § 3001(3) reasonably or necessarily safeguard New York's interest in educating public school children to participate in this democratic society?

Statement of the Case

Appellee Norwick and intervenor-appellee Dachinger are permanent resident aliens (A. 5, A. 17, A. 25, A. 49, n. 2).* Ms. Norwick is a citizen of Great Britain. She has resided in the United States since 1965 and is married to an American citizen (A. 5, A. 6, A. 25, A. 49, n. 2). She has

* The record does not indicate when either appellee became a permanent resident.

decided to retain her British citizenship indefinitely (A. 35). Ms. Dachinger is a citizen of Finland. She has resided in the United States since 1966 and is also married to an American citizen (A. 17, A. 18, A. 25, A. 49, n. 2). She has decided to retain her Finnish citizenship indefinitely (A. 35).

Both appellees applied to the Education Department for certification as early childhood and upper elementary public school teachers, Nursery ("N") through sixth grade. Education Law § 3006; 8 NYCRR §§ 80.1(a)(10), (36), 80.15(a)(i), (b). Their applications were denied because they were not American citizens or applicants for citizenship as required by Education Law § 3001(3) and because they were not within the excepted categories providing temporary certificates for aliens, i.e. Education Law § 3001-a, authorizing temporary certificates for first preference aliens unable to become permanent residents because of over-subscribed quotas, and 8 NYCRR § 80.2(i), authorizing temporary certificates for aliens under statutory disabilities and those with skills not available from permanently certified teachers. Ms. Norwick applied for temporary certification only (A. 6), apparently aware that in addition to her non-applicant status, she did not meet the post-graduate education requirements for a permanent certificate. 8 NYCRR § 80.15(b). Her application was denied on March 19, 1974 (A. 7). Ms. Dachinger possesses an appropriate graduate degree (A. 17) and requested permanent certification (A. 18). Her application was denied on April 23, 1975 (A. 19). Ms. Dachinger had obtained a temporary elementary school certificate from the Education Department in 1970 (A. 18). The application for that certificate required her to file a declaration of intention to become a United States citizen.

Appellee Norwick commenced this action for declaratory and injunctive relief on June 27, 1974 (A. 35).* The

* Appellee Dachinger intervened on September 3, 1975 with the consent of the appellants (A. 2, 9/5/75 entry, A. 36).

complaints allege that Education Law §§ 3001, 3001-a and 8 NYCRR § 80.2(i) deny aliens equal protection and due process of law (A. 8, 19-20) and violate the Supremacy Clause because they conflict with the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* A. 8, A. 20.

Jurisdiction was alleged under 42 U.S.C. §§ 1981, 1983 and 28 U.S.C. § 1343(3) and (4). A. 4, A. 16, A. 35. Appellants' answer was read in opposition to both complaints. It traversed the material allegations and supported the constitutionality of the challenged provisions and their consistency with the Immigration and Nationality Act (A. 12-A. 13, A. 14). A three-judge court was convened with the consent of the appellants (A. 22), and the action was determined on appellees' motion for summary judgment (A. 24-A. 34, A. 36).

The three-judge court limited its holding to appellees' equal protection claim against Education Law § 3001(3). A. 36, A. 50, n.6, A. 39-A. 48. In the lower court's view, *Graham* v. *Richardson,* 403 U.S. 365 (1971), *Sugarman* v. *Dougall,* 413 U.S. 634 (1973) and *In re Griffiths,* 413 U.S. 717 (1973), required the application of a heightened equal protection test to "any challenged State statute or regulation placing aliens, as a class, at a disadvantage vis-a-vis citizens." A. 42. The court then acknowledged the "strong nexus between the classroom and the political community" (A. 44) and the teacher's role in shaping the " 'attitude of young minds toward the society in which they live,' " [A. 44-45, quoting *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952)] but found nonetheless that § 3001(3) could not survive strict scrutiny. The statute was considered imprecise because it applied to all aliens in all teaching positions in the public school system (A. 44-A. 45), because it did not apply to private school teachers (A. 45) and because it authorized temporary certificates for aliens with skills not otherwise available (A. 45-A. 46). Appellees' offer of the testimony of Dr. Anthony E. Terino, then

Director of the Division of School Supervision of the Education Department, was rejected (A. 47-A. 48). Dr. Terino would have testified that teachers in elementary and secondary public schools are required to impart principles of American citizenship to their students, that teachers do not simply instruct in particular subject matter but are examples who influence student attitudes and behavior, and that aliens who prefer to continue their allegiance to another nation and their identification with that nation's political traditions, culture and mores are inappropriate candidates for teaching positions (A. 33-34, A. 47). The court stated that the proposed testimony would not support the conclusion that a permanent resident alien's voluntary decision to retain native citizenship rendered him unqualified to teach (A. 48) and that the testimony would not establish that the exclusion of all non-applicant aliens from all teaching positions was necessary to advance New York's interests Education Law § 3001(3). A. 47.

Since the entry of the Order and Judgment below on August 25, 1976 (A. 54), 240 aliens have obtained permanent teaching certificates from the Education Department. Each applicant was advised that the continuing validity of his certificate was contingent upon the outcome of this appeal.

Qualifying Teachers for New York Public Schools: "Citizenship" Requirements

New York qualifies teachers for elementary and secondary public schools on the basis of education, experience, character and citizenship. Education Law §§ 3001(3), 3001-a; 8 NYCRR Parts 7, 80, 83. Citizens and aliens who apply for citizenship are eligible for permanent certificates. Education Law § 3001(3). Aliens under statutory disabilities, exchange teachers and those with skills not available from permanently qualified teachers are eligible for temporary certificates. Education Law §§ 3001(3),

3001-a, 3005; 8 NYCRR § 80.2(i).* Public funds cannot be used to compensate teachers who do not meet all applicable requirements, Education Law §§ 3309, 3604(7); 8 NYCRR § 7.3, and payments to "unqualified teachers" are misdemeanors. Education Law § 3010.**

Citizenship or application for citizenship became a statewide qualifying requirement in 1918. L. 1918, c. 158, § 1, eff. Apr. 4, 1918.*** In 1965, first preference aliens unable to adjust their status to permanent residents because of over-subscribed quotas became eligible for temporary certificates. L. 1965, c. 595, § 1, eff. June 28, 1965, adding Education Law § 3001-a. In 1967, the Commissioner of Education was empowered to make regulations concerning the employment of alien public school teachers. L. 1967, c. 282, § 1, eff. July 1, 1967, adding concluding sentence to Education Law § 3001(3) as it is currently in force.**** Section 80.2(i) of 8 NYCRR, authorizing temporary certificates for aliens unable to apply for citizenship because of statutory disabilities and for aliens with skills not

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* The Education Department has advised that no temporary certificates have been issued under Education Law § 3001-a, quota disabilities, or 8 NYCRR § 80.2(i)(1), skills not available from permanently certified teachers. Certificates have not been issued under § 3001-a because of the broader disabilities provision in 8 NYCRR § 80.2(i)(2). Certificates have not been issued under § 80.2(i)(1) because no emergent instructional need has been presented. Approximately 200 temporary certificates are issued annually under the § 80.2(i)(2) disabilities provision.

** Section 80.32 of 8 NYCRR authorizes temporary and conditional employment of public school teachers who do not meet all the educational requirements for certification if no "certified and qualified teacher is available after extensive recruitment."

*** Only incumbents could qualify as applicants under early legislation. L. 1918, c. 158; L. 1919, c. 120. Any applicant for citizenship became eligible for permanent certification in 1922. L. 1922, c. 315, eff. Mar. 28, 1922.

**** Education Law § 3005, providing, *inter alia*, for temporary certificates for foreign exchange teachers was also amended in 1967, L. 1967, c. 282, § 2, to extend the period of certification from one to two years.

available from permanently qualified teachers, was promulgated by the Commissioner on November 28, 1967 under L. 1967, c. 282.

The Commissioner's power under the 1967 legislation (L. 1967, c. 282, § 1) is limited to the issuance of temporary certificates. The bill was prepared by the Education Department and introduced at its request. McKinney's 1967 Session Laws of New York ("Session Laws") 280, Note. It was intended to enable the employment of a non-applicant alien for "a limited period" (Memorandum of the Education Department in Support of L. 1967, c. 282, 1967 Session Laws, p. 1461), and has been implemented consistently with this purpose and with Education Law § 3001-a, authorizing only temporary certificates for first preference aliens under quota disabilities.

New York's "system of free common schools, wherein all the children of [the] state may be educated" was constitutionally mandated in 1894. N.Y. Const. 1894, incorporating new Art. 9, § 1, renumbered Art. 11, § 1, eff. Jan. 1, 1939.* The schools were to be publicly funded, and numerous enough to accommodate all children whose parents or guardians chose to use them. 3 LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 1894-1905 ("Lincoln") 555-56 (1906).

Public education had existed for one hundred years in New York prior to attaining constitutional status in 1894. From the first legislation, L. 1795, c. 75, eff. Apr. 1795, to the present, cost has been shared by state and local school districts.** The districts have been, and continue to be,

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* "Common schools" are elementary and secondary schools. 10 N.Y. State Rep. 449 (1916).

** L. 1795, c. 75, provided 20,000 pounds to be apportioned among localities on condition that the apportioned amounts be matched or exceeded. Current provisions, Education Law Arts. 73, 74, continue to require state and local contributions.

responsible for administration (Education Law, Arts. 31-51), curriculum development (Education Law §§ 801-811, 3204) and teacher selection (Education Law Arts. 61, 63) under limited statewide standards. *See Kramer* v. *Union School District,* 395 U.S. 621, 623-24 (1969).*

Curriculum has been subject to generalized state standards from the outset.** Current provisions for the first eight years of instruction require courses in "at least the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York State and science." Education Law § 3204(3)(a)(1); 8 NYCRR § 100.1(e). Children over eight years of age are required to participate in courses in patriotism and citizenship, including study of the federal and state constitutions and Declaration of Independence in order to promote "patriotic and civic service and . . . foster . . . qualities . . . essential . . . to meet the objectives of citizenship in peace or in war." Education Law § 801(1),(2),(3). Current provisions for

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* The current plan for school district organization derives from L. 1812, c. 242, eff. June 19, 1812. *See* Committee Report, JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW YORK, 35th Session, 1812 ("1812 Committee Report"), pp. 102, 104. This legislation is generally regarded as establishing the modern, common school system. *Judd* v. *Board of Education,* 278 N.Y. 200, 15 N.E. 2d 576, 579-80 (1938). It introduced state supervision under a Superintendent and continued the localities' role in funding and in the selection of courses and methods of instruction. 1812 Committee Report, pp. 103, 104-105; 3 Lincoln, pp. 539-40.

** L. 1795, c. 75 required that the children be instructed in the English language, grammar, arithmetic, mathematics and "such other branches of knowledge as are most useful and necessary to complete a good English education." 3 Lincoln, p. 526. Under L. 1812, c. 242, children were to be instructed in "at least those branches of education which are indispensably necessary to every person in his intercourse with the world, and to the performance of his duty as a useful citizen," including "[r]eading, writing, arithmetic and the principles of morality."

secondary education require instruction in "at least the English language and its use, civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declaration of Independence and established by the constitution of the United States" [Education Law § 3204(3)(a)(2); 8 NYCRR § 100.1 (a)-(d)] and authorize courses in communism. Education Law § 3204(2)(3).* Instructional exercises on the federal and state bills of rights [Education Law § 801(4)], the flag [Education Law § 802(1); 8 NYCRR Part 108], and patriotic holidays [Education Law §§ 802(2); 8 NYCRR § 109.1] are also required in all public schools.** Article 11, § 3 of the state constitution, adopted (as Art. 9, § 4) in 1894 with § 1 mandating free, common schools, prohibits direct or indirect public aid to any school "wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. *See McCollum* v. *Board of Education,* 333 U.S. 203, 214-15 (1948) and 3 Lincoln, pp. 561-73.***

Certification of public school teachers became a statewide requirement in 1843 (L. 1843, c. 133, § 10, eff. June 1, 1843) and citizenship, a statewide requirement in 1918, as

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* The issuance of a state diploma signifies the satisfactory completion of the prescribed courses and at least eighteen additional units. 8 NYCRR § 103.2.

** Instruction in physical education [Education Law § 803(1); 8 NYCRR §§ 135.1-135.4], highway and traffic safety [Education Law § 806(1); 8 NYCRR § 107.1], conservation [Education Law § 810(2)], humane treatment of animals [Education Law § 809] and the effects of alcohol [Education Law § 804(1)] and narcotics [Education Law § 804-a(1)] are also required under statewide curriculum standards.

*** Public expenditures for examination and inspection of sectarian schools were excepted initially. N.Y. Const. 1894, Art. 9, § 4. Expenditures for the transportation of pupils were excepted in 1938. N.Y. Const. Art. 11, § 3, as amended.

noted.* Certificates are currently available for early childhood and upper elementary education, N through sixth grade [8 NYCRR §§ 80.1(a)(10),(36), 80.15(a)(1)(i),(b)], for these grades plus early secondary grades, including an academic subject, i.e. N through nine [8 NYCRR §§ 80.1 (a)(11), 80.15(a)(1)(ii), (b)], and for academic subjects taught in secondary schools, i.e. English, foreign languages, mathematics, social studies and science [8 NYCRR §§ 80.1 (a)(1), 80.16(a)(1)(ii), (b)].** Any certified teacher may be required to spend up to five classroom hours per week teaching subject matter outside his certification. 8 NYCRR § 80.2(c).*** All public school teachers, including temporarily certified aliens, are required to take an oath to support the federal and state constitutions and to faith-

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* New York City and Buffalo issue their own licenses [Education Law §§ 2596, 3008; 8 NYCRR § 80.2(j)], but must comply with the citizenship requirements in Education Law §§ 3001(3), 3001-a and 8 NYCRR § 80.2(i). These city certification requiremens generally parallel the state requirements discussed. See e.g., BYLAWS OF THE BOARD OF EDUCATION, CITY SCHOOL DISTRICT OF NEW YORK, §§ 5.1.1, 5.1.2, App. B-2-B-3 (2/77 rev. ed.).

** Teaching certificates are also available in occupational subjects (8 NYCRR § 80.5), special education for the hearing and visually impaired (8 NYCRR § 80.6), reading (8 NYCRR § 80.7), in special subjects including physical education (8 NYCRR § 80.17) and in media, library and educational communication (8 NYCRR § 80.18).

*** Tenure parallels certification and may be earned for the elementary grades, N-6 (8 NYCRR § 30.5), the middle grades in non-academically departmentalized schools, 7-9 (8 NYCRR § 30.6) and for academic subjects in five areas, English, social studies, mathematics, science and foreign languages (8 NYCRR § 30.7). Some special subject tenure areas are available, e.g. art, education for the visually or hearing impaired (8 NYCRR § 30.8). A teacher earns tenure during his probationary term by alloting a substantial portion of his time, at least 40%, to insruction in the tenure area. 8 NYCRR §§ 30.1(g), (h), 30.9(e). The local districts must permit a teacher to spend the required amount of time in his tenure area [8 NYCRR § 30.9(a), (b)], but may also permit him to earn tenure in more than one area if he is appropriately certified. 8 NYCRR § 30.9(c), (d).

fully discharge the duties of their positions. Education Law §§ 3001-a, 3002. None may be subjected to inquiry about his religious beliefs. 8 NYCRR § 7.4.

New York has continuously recognized and protected the right to choose private education. *Judd* v. *Board of Education, supra,* 15 N.E. 2d at 582; *Id.* at 586 (CRANE, C. J., dissenting); *Packer Collegiate Institute* v. *University of the State of New York,* 273 App. Div. 203, 76 N.Y.S. 2d 499, 504 (3rd Dept.), *rev'd on other grounds,* 298 N.Y. 184, 81 N.E. 2d 80 (1948). But, "[p]rivate, denominational and sectarian schools," those wholly or partially under the control or direction of any religious denomination, are not part of the common school system. *Judd, supra,* at 579. *Id.* at 580-82. N.Y. Const. Art. 11, § 3. Compliance with the Compulsory Education Law, L. 1894, c. 671, eff. Jan. 1, 1895, currently Education Law Art. 65, Pt. I, requires that instruction outside the public school system be "substantially equivalent" and provided by "competent teachers." Education Law § 3204(2).* Elementary education must include the "twelve common branches" as in public schools [Education Law § 3204(3)(a)(1)], and secondary education must include English, civics, hygiene, physical training and American history, including principles of government, and may include communism. Education Law § 3204(3)(a)(2), (3). See discussion pp. 9-10. Courses in patriotism, citizenship, and historical documents need only be similar to those provided in public schools. Education Law § 801(1), (2). Flag exercises, the celebration of patriotic holidays, and special courses

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* Nonpublic schools are subject to state inspection. Education Law § 305(2). Pupils are included in certain statewide examinations. Education Law § 209; 8 NYCRR §§ 3.45, 8.2 103.2 The state subsidizes transportation, certain textbooks, the statewide examinations and record-keeping related to pupil census and health. It also provides approximately 1 million dollars annually for certain services offered by non-sectarian schools. Education Law § 3602-c.

in the federal and state bills of rights are not required. Education Law §§ 801(4), 802(1), (2). Neither the state nor the local districts qualify or certify teachers for private schools.*

Approximately 173,975 teachers now instruct 3,189,781 pupils in the state's public schools.** The cost of operating the schools exceeds 3 billion 100 million dollars annually. Approximately 40% is state funded, the balance is locally funded.*** Approximately 588,258 pupils attend private schools. Of that number, only 64,379 attend schools without religious affiliation.****

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* The state does not qualify teachers for public or private colleges or universities under Education Law § 3001(3) or under any other provision discussed in this brief. Dicta to the contrary in *Kay* v. *Board of Higher Education,* 173 Misc. 2d 943, 18 N.Y.S.2d 821 (Sup. Ct. N.Y. Co.), *aff'd,* 259 App. Div. 879, 20 N.Y.S. 2d 1016; *leave app. den.,* 259 App. Div. 1000, 21 N.Y.S.2d 396 (First Dep't), *leave app. den.,* 284 N.Y. 578 (1940) is erroneous.

** See 1976-77 PUBLIC SCHOOL PROFESSIONAL PERSONNEL REPORT Table 4, p. 16 (7/77) for teacher count. Pupil count for fiscal 1977-78 provided by the Education Department.

*** Figures for fiscal 1977-78 provided by the Education Department.

**** Pupil enrollment for fiscal 1977-78 provided by the Education Department. *Compare, Committee for Public Education* v. *Nyquist,* 413 U.S.. 756, 768 (1973), noting that 700,000-800,000 New York pupils attended private schools and that approximately 85% of those schools were religiously affiliated.

Summary of Argument

Public schools determine the future of our society because they provide the knowledge, skills and attitudes that enable and encourage "good citizenship." *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). The teacher gives this educational process meaning. He communicates the relevant information and makes discretionary decisions that reflect, support and enforce societal standards. Children learn from their teacher's example and imitate his attitudes. Education Law § 3001(3) qualifies individuals for this important public trust on the basis of their ability and willingness to identify with the American democratic principles they must impart to their pupils. Citizens and aliens who apply for citizenship are eligible for permanent teaching certificates. Aliens like appellees who can elect American citizenship but prefer to identify with a different national tradition are ineligible.

The public school teacher's essential role in training children to participate in American political processes requires that the distinctions drawn by § 3001(3) be reviewed and sustained under the reasonable relation test applicable to important governmental positions. *Foley* v. *Connelie*, —— U.S. ——, 98 S. Ct. 1067, 1070-71 (1978); *Sugarman* v. *Dougall*, 413 U.S. 634, 647-49 (1973). However, § 3001(3) also survives strict scrutiny because it is congruent with the protective political purposes it serves. The statute is limited to the educational system responsible for securing the future of the American political community and does not infringe the rights of parents to emphasize other political or philosophical values or religious beliefs in educating their children. It is co-extensive with the school years in which the purposes it serves can be best achieved, and it includes and excludes individuals in terms of its purposes. The included individuals adopt the principles they must teach and can now, or will shortly be able, to participate in the political processes that their teaching is intended to

support. The excluded individuals refuse to adopt the relevant principles and deny themselves the capacity to participate in American political processes, placing themselves at odds with the instructional purposes the statute reflects. Section § 3001(3) does not become imprecise because some applicant aliens are eligible for temporary certificates under related provisions. Only aliens disabled from electing American citizenship have obtained temporary certificates, and they do not provide the negative example manifested by the aliens excluded under § 3001(3). If § 3001(3) is not considered precise as a matter of law, the case must be remanded for an evidentary hearing. Appellants' proof on this issue (A. 33-A. 34) had to result in judgment in their favor if believed. However, the proof was rejected without hearing, and summary judgment granted for appellees (A. 45, A. 47-A. 48).

POINT I

Education Law § 3001(3) does not violate the equal protection clause because it limits permanent certification of public school teachers to citizens and aliens who apply for citizenship. Public education trains children to participate in American democratic society. Section 3001(3) qualifies the individuals who undertake this responsibility in terms of their ability and willingness to identify with this society. Although properly reviewed under the traditional equal protection test, Section 3001(3) survives strict scrutiny because the state interests involved are substantial and the classification is precise.

A. The traditional equal protection test requiring a showing of only a reasonable relationship to a legitimate state interest is applicable to Education Law § 3001(3).

"Americans regard the public schools as a most vital civic institution for the preservation of a democratic system

of government." *Abington School District* v. *Schempp,* 374 U.S. 203, 230 (1963) (BRENNAN, J., concurring). "The minds of our youth are developed there and the character of that development . . . determine[s] the future of our land. Indeed our very existence depends upon it." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 628 (1967) (CLARK, J., dissenting). Public education is training for the responsibilities of citizenship, *Wisconsin* v. *Yoder,* 406 U.S. 205, 221 (1972); *Abington School District* v. *Schempp, supra,* at 241-42, and perhaps the most dominant factor affecting political consciousness and participation in political processes. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 113 (1973) (MARSHALL, J., dissenting).

The public school teacher gives this educational process meaning. He instructs in the relevant subject matter from texts and by his own example. He instills positive attitudes towards democratic government and individual participation in the political process. He makes judgments on the basis of societal norms which modify his pupils' behavior and affect their academic and working lives. See discussion pp. 22-24. As this Court has recognized, the teacher "shapes the attitude of young minds towards the society in which they live." *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952). Both the pupil and the state have a "vital concern" in his fitness to carry out this task. *Adler* v. *Board of Education, supra.* See *Donohue* v. *Copiague Union Free School District,* —— A. D. 2d ——, 180 (24) N.Y.L.J. 4 cols. 1, 3 (2d (2d Dep't July 31, 1978), denoting teacher's position as an "important public trust" but dismissing tort claim of illiterate graduate.

Education Law § 3001(3) and related provisions qualify individuals who undertake the responsibilities of public school teachers in terms of their ability and willingness to identify with the democratic principles they must impart. Permanent resident aliens applying for naturalization are eligible for permanent certificates under § 3001(3) because they are "most like citizens." *Mathews* v. *Diaz,* 426 U.S. 67,

83 (1976).* Only aliens like appellees who are able to choose American citizenship but prefer foreign citizenship are excluded from these certificates. Aliens permitted to work in the United States but disabled from electing citizenship by federal statutes are eligible only for temporary certificates. Education Law §§ 3001(3), 3001-a; 8 NYCRR § 80.2(i)(2).** Once their disabilities are relieved, they must apply for citizenship or cease teaching.***

The equal protection test requiring only a reasonable relation to a legitimate state interest applies to Education Law § 3001(3) even if it is viewed as a classification "based on alienage." *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971). *See Nyquist* v. *Mauclet,* 423 U.S. 1, 97 S. Ct. 2120, 2124-26 (1977), state classification providing grants, scholarships and loans to some alien students but not others is still one "based on alienage" and warrants strict scrutiny. *But see* dissenting opinions of BURGER, C.J., *Id.* at 2128, POWELL, J., *Id. at* 2128-29, and REHNQUIST, J., *Id.* at 2129-31, classification that does not exclude aliens *vel non* is not "based on alienage" and should be reviewed under reasonable relation test.

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* Permanent resident aliens are "immigrants" under 8 USC § 1101(a)(5). All other aliens are admitted to the United States on a temporary basis. *Elkins* v. *Moreno,* —— U.S. ——, 55 L.Ed.2d 614, 628 (1978).

** Conditional entrants [8 USC § 1153(a)(7)] and paroled refugees [8 USC § 1181(d)(5)] may work in the United States but cannot adjust their status to permanent residents without discretionary federal approval. See also 8 USC § 1101(a)(15)(A), (G)-(L), authorizing the admission of certain non-immigrants and limiting their worked-related activities but placing no similar restrictions on spouses and children.

*** Alien exchange teachers here as representatives of their own countries are eligible for temporary certificates without regard to disabilities. Education Law § 3005. A non-applicant alien is eligible for a temporary certificate in order to meet emergent instructional needs. 8 NYCRR § 80.2(i)(1). However, no such certificates have been issued. See discussion p. 7.

Last Term, the Court applied the reasonable relation test to New York's exclusion of aliens from the State Police, *Foley* v. *Connelie,* —— U.S. ——, 98 S. Ct. 1067, 1069-71 (1978), and reiterated the principles, stated initially in *Sugarman* v. *Dougall,* 413 U.S. 634, 467-49 (1973), that determine whether the classification here in issue is subject to strict scrutiny or to a test of reasonableness. Classifications excluding aliens from positions in democratic institutions that substantially affect the state's political community are subject only to a test of reasonableness. *Foley* v. *Connelie, supra,* at 1070-71, citing *Sugarman* v. *Dougall, supra.* Among the positions from which aliens may be excluded on this basis are those involving discretionary decisionmaking or the formulation of execution of broad public policy. *Foley, supra,* at 1071.

Education § 3001(3) classfiies aliens within this governmental exception to strict scrutiny. The continued existence of the "political community," *Sugarman* v. *Dougall, supra,* at 647, depends on public schools to train children to participate in democratic political processes, and the teachers' role in accomplishing this task is profound. See discussion pp. 16, 23-25. The teachers' decisions are no less discretionary than those of the policeman and the public policy he formulates and executes, no more precisely defined. His effect on the lives of his pupils is more significant and more enduring than the ballot of a voter, the choice of a legislator or the actions of a policeman or juror except in the most extraordinary circumstances. *See Foley* v. *Connelie, supra.*

Two additional considerations support the application of the reasonable relation test. First, § 3001(3) does not classify aliens in terms of the disabilities associated with their characterization as a "discrete and insular" minority. *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152-53, n. 4 (1938). Permanent resident aliens determine their own eligibility for permanent teaching certificates under § 3001(3) by electing or refusing naturalization.

No period of enforced ineligibility is imposed during which the alien is incapable of changing his status to obtain the benefit of the statute.* Thus, the principal basis for subjecting legislation affecting aliens to strict scrutiny is not presented. *Nyquist* v. *Mauclet, supra* at 2129-31 (REHNQUIST, J. dissenting). *See Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 313-14 (1976) (*per curiam*); *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 28 (1973). Moreover, since permanent resident aliens can elect to be treated like citizens for purposes of § 3001(3), there is no basis for invoking the extraordinary protection from the majoritarian political process that strict scrutiny implies. *Foley* v. *Connelie, supra,* at 1070. *See Massachusetts Board of Retirement* v. *Murgia, supra; San Antonio School District* v. *Rodriguez, supra.*

Second, the citizens and aliens eligible for permanent teaching certificates under § 3001(3) do not share any relevant characteristic with the aliens who are ineligible. Eligible aliens have chosen complete identification with the United States and will attain the same capacity as citizens to participate in the democratic political processes they teach their pupils. Ineligible aliens, "by clear implication," *Nyquist* v. *Mauclet, supra,* at 2128 (BURGER, C.J., dissenting), reject complete identification and cannot participate in political processes. *Foley* v. *Connelie, supra,* at 1070. Prior decisions subjecting alien-related classifications to strict scrutiny are limited to situations in which both included and excluded individuals were equally qualified for the positions in issue** or contributed equally to the

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* Education Law § 3001(a) and 8 NYCRR § 80.2(i)(2) complement § 3001(3) in this regard. In authorizing temporary certificates for aliens under federal disabilities, they avoid the period of ineligibility that would otherwise be imposed on aliens deprived of the capacity to make the election § 3001(3) requires.

** *See Examining Board* v. *Flores de Otero,* 426 U.S. 572 U.S. 572 (1976) (engineers); *In re Griffiths,* 413 U.S. 717 (1973) (lawyers); *Sugarman* v. *Dougall, supra* (aliens qualified for at least some civil service positions).

benefits sought with their tax dollars.* Herein, the non-applicant alien rejects the choice that would make him suitable and does not make any other contribution consistent with the purposes of the statute regardless of the length of his residence.

If Education Law § 3001(3) is strictly scrutinized, the inquiry is limited to whether or not the state has shown that its interest in the statute is "both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to . . . the safeguarding of its interest." *In re Griffiths, supra,* at 772 (footnotes omitted). *Foley* v. *Connelie, supra,* at 1073 (BLACKMAN, J., concurring); *Examining Board* v. *Flores de Otero, supra,* at 602; *Sugarman* v. *Dougall, supra,* at 642. The state interests advanced by the statute need not be compelling. *Compare* opinion of the district court, A. 42-A. 43.

B. New York's interest in educating public school children for participation in American democratic society is legitimate and substantial. In denying permanent teaching certificates to aliens who are eligible for American citizenship but prefer foreign citizenship, Education Law § 3001(3) establishes a narrow limitation consistent with the achievement of this interest. There is no appropriate classification which is more precise and less restrictive.

Public education is "perhaps the most important function of state and local government," *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954) because it is the institution through which democratic society secures its future. See discussion p. 15. Public schools provide "the very foundation of good citizenship," and awaken children to the societal values which support our democratic system. *Brown* v. *Board of Education, supra.* This initiation into

* *See Nyquist* v. *Mauclet, supra* (student grants, scholarships and loans); *Graham* v. *Richardson, supra* (welfare).

our "common" heritage is "civic and patriotic," free from "parochial, divisive, or separatist influences." *Abington School District* v. *Schempp,* 374 U.S. 203, 242 (1963) (BRENNAN, J., concurring). It is an accepted, and perhaps the most powerful agent, for social cohesion. *McCollum* v. *Board of Education,* 333 U.S. 203, 216 (1948) (FRANKFURTER, J., concurring); *Minersville District* v. *Gobitis,* 310 U.S. 586, 595-96 (1940).

Public schools provide children with the knowledge and skills necessary for participation in national, state and local political processes. *Wisconsin* v. *Yoder,* 406 U.S. 205, 221 (1972); *Brown* v. *Board of Education, supra,* at 493; CUBBERLY, EDUCATION IN THE UNITED STATES 113 (1919); National Council on Education, WHAT ARE THE MAJOR OBJECTIVES OF EDUCATION ("Objectives of Education") 6-12 (1931); Commission on the Reorganization of Secondary Education, CARDINAL PRINCIPLES OF SECONDARY EDUCATION ("Principles of Secondary Education") 7-14 (1918). New York's curriculum requires courses in civics, national and state history, constitutional rights and obligations and the celebration of patriotic events and rituals.* *See* discussion pp. 9-10 and Educational Policies Commission, THE CENTRAL PURPOSE OF AMERICAN EDUCATION (1961) ("Central Purpose of Education"); Citizen Education Study, Detroit, DEVELOPMENT OF CHILDREN (1949); Objectives of Education; Principles of Secondary Education; HESS & TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN ("Political Attitudes in Children") 105-108 (1967); DAWSON & PREWITT, POLITICAL SOCIALIZATION ("Political Socialization") 155 (1969). *See also West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Minersville School District* v. *Gobitis, supra,* at 596 (1940); *Russo* v.

* It has been shown that public school civics courses do increase support for democratic principles. Litt, *Civic Education, Community Norms and Political Indoctrination,* 28 AM. SOC. REV. 69, 73 (1963).

Central School District No. 1, 469 F. 2d 623, 632 (2d Cir. 1972).

Public schools also instill the values and attitudes necessary to full and effective participation in political processes. MERELMAN, POLITICAL SOCIALIZATION AND EDUCATIONAL CLIMATES ("Political Socialization and Educational Climates") 5 (1971); Political Socialization, p. 147; KEY, PUBLIC OPINION AND AMERICAN DEMOCRACY 316 (1961); MERRIAM, THE MAKING OF CITIZENS 17-19 (1931); DEWEY, DEMOCRACY AND EDUCATION 26 (1926); Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach,* 124 U. PA. L. REV. 1293, 1297, 1343 (1976).

The role of the public schools in forming and preserving the character of the political community is demonstrated by recent studies. *See* Note, *Aliens' Right to Teach: Political Socialization and the Public Schools* ("Aliens' Right to Teach"), 85 YALE L.J. 90, 100-105 (1975). By their last year of secondary education, public school children from socially and economically diverse backgrounds, who varied in their initial acceptance of democratic principles, develop shared, positive attitudes about freedom of speech and participation in government. Political Socialization and Educational Climates, pp. 9-11. Between the second and eighth grades, public school children gradually approach the societal norm in their understanding of democracy and of the roles of government officials. Political Attitudes in Children, pp. 31-66, 111-115. Once the student leaves secondary school, his orientation towards our democratic system is largely crystallized. WILSON, COLLEGE PROFESSORS AND THEIR IMPACT ON STUDENTS 88-89 (1975). His values are formed during his elementary and secondary school years, and he now shares and defines societal standards. Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach,* 124 U.PA.L.REV. 1293,

1343-1344 (1976). *See also Tilton* v. *Richardson,* 403 U.S. 672, 686 (1971); Gianella, *Religious Liberty, Non-Establishment and Doctrinal Development, Pt. II: The Non-Establishment Principle* 81 HARV.L.REV. 513, 581-584 (1968).

The teacher's role in the public schools is vital. Throughout the period of school attendance he is the educational official with whom the pupil has constant and direct contact. He is the first representative of societal authority outside the family circle the pupil regularly encounters. Political Socialization, pp. 158, 163; Aliens' Right to Teach, p. 102. *See Abington School District* v. *Schempp, supra,* at 263 (BRENNAN, J., concurring); Political Attitudes in Children, p. 20. He is viewed with "awe and respect," especially in the primary grades, The John Dewey Society, THE TEACHER'S ROLE IN AMERICAN SOCIETY ("Teacher's Role in American Society") 75 (Stiles, ed. 1957), and the majority of students identify him as a government official. EASTON & DENNIS, CHILDREN IN THE POLITICAL SYSTEM ("Children in the Political System") 122 (1969). *See* COE, EDUCATING FOR CITIZENSHIP ("Educating for Citizenship") 38 (1932). By the eighth grade, the pupil believes that his teacher is more helpful than other governmental figures or institutions. Children in the Political System, pp. 150-151 (results of a survey of second through eighth grade pupils).

The teacher makes discretionary decisions that significantly affect the most "sensitive" areas of the pupil's life. *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952). *Shelton* v. *Tucker,* 364 U.S. 479, 485 (1960). He assesses each pupil's abilities in determining whether to place him in a "general," "vocational" or "college preparatory" curriculum track. *Goss* v. *Lopez,* 419 U.S. 565, 597 (1976) (POWELL, J., dissenting). He assesses the pupil's achievement and behavior on the basis of societal standards in deciding whether to promote him. *Goss, supra;* Teacher's

Role in American Society, p. 74. He initiates disciplinary action such as suspension and expulsion, *Goss, supra,* at 597 (POWELL, J., dissenting) and may impose corporal punishment to modify a pupil's behavior. *Ingraham* v. *Wright,* 430 U.S. 651 (1977).

The teacher's daily classroom activities require him to instruct his pupils in American democratic principles and instill the values and attitudes which give those principles meaning. See discussion pp. 9-10, 16, 22-24. Within existing curriculum requirements, the teacher is free to decide what information and skills are important. Teachers' Role in American Society, p. 75; DEWEY, EDUCATION TODAY 8-9 (1940); Educating for Citizenship, p. 102. If a standard text is mandated, he still has largely non-reviewable discretion to emphasize what he wants and to choose the teaching methods he will use. *Lemon* v. *Kurtzman,* 403 U.S. 602, 617 (1970); Political Socialization and Educational Climates, p. 104; Central Purpose of Education, p. 11.

In addition to instructing his pupils with consciously selected materials and teaching methods, the teacher instructs by his own example. *Miller* v. *School District,* 495 F. 2d 658, 667 (7th Cir. 1974); *Bay* v. *State Board of Education,* 253 Ore. 601, 604, 378 P. 2d 558, 561 (1963); Political Socialization, p. 163; Teacher's Role in American Society, p. 81; Aliens' Right to Teach, p. 102. Children identify with their teachers and attempt to imitate the attitudes they perceive, including political attitudes. Political Attitudes in Children, p. 21. By the end of the primary grades, students substantially share their teachers' attitudes towards democracy. Children in the Political System, pp. 111-40.

A very high correlation exists between the attitudes held by eighth grade pupils and by their teachers on the qualities of "good citizens," the concepts comprising the democratic ideal, the relative importance of decisions made by governmental figures and institutions, the coercive power of the

police and the President, the responsiveness of governmental figures and institutions to individual and community problems, and the relative influence of the United States and the United Nations in preventing war. Political Attitudes in Children, pp. 31, 39, 41, 49, 55, 66, 111-16. Given that both conscious and subconscious attitudes affect the quality of a teacher's instruction, he may be required to be the "ego ideal" of the American democratic principles, values and attitudes he must impart. Teacher's Role in American Society, p. 96; Educating for Citizenship, pp. 102-103.

Education Law § 3001(3) bears directly on the state interests just described. The teachers who obtain permanent certificates under the statute determine the character of the public education New York provides by reason of their numbers, now approximately 173,975, and lengthy period of service. The citizens and aliens eligible for permanent certificates identify with the democratic principles, values and attitudes they will teach from curriculum materials and by their own example. The ineligible alien, although able to choose American citizenship, prefers foreign citizenship. He does not want to be a member of the political community. See *Foley* v. *Connelie,* —— U.S. ——, 98 S. Ct. 1067, 1070 (1978). He does not want to participate in democratic decisionmaking, *Ibid.,* and his choices in this regard are inconsistent with public education's purpose to secure the future of the American society and to engender affirmative support for its institutions. As is apparent, these inclusionary and exclusionary characteristics of § 3001(3) safeguard and are congruent with the substantial state interests the statute is intended to serve. No 'individualized' determination of eligibility is warranted. *Compare* opinion of the district court, A. 45, A. 47-A. 48. The excluded alien adopts exactly the attributes the statute rejects when he elects non-applicant status, and no investigation of his background or credentials can overcome the effect of his choice.

Education Law § 3001(3) is hardly objectionable because it applies to "*all* teaching positions in the public school system." Opinion of the district court, A. 45. All teachers instill political values and attitudes by their own example regardless of the subject matter they teach, and all teachers make important, discretionary judgments based on societal norms. See discussion pp. 16, 23-25. Moreover, the district court's view that certain grades, teaching positions or subject matters could be made available to non-applicant aliens with permanent teaching certificates (A. 45, A. 48) ignores the existing organization of public school studies.

Elementary school studies must include the common branches—arithmetic, reading, spelling, writing, English, geography, United States history, civics, hygiene, physical training, New York history and science. Education Law § 3204(3)(a)(1); 8 NYCRR § 100.1(e). Teachers certified for early childhood and upper elementary education (N-6), the certification requested by appellees, instruct in all of these subjects. 8 N.Y.C.R.R. §§ 80.1(a)(7), 80.15 (a)(1)(i), (b). English, civics, hygiene, physical training, American history, including the principles of democratic government are required in secondary schools. Education Law § 320(3)(a)(2); 8 NYCRR § 100.1(a)-(d). Teachers certified for secondary education may teach all common branches plus an academic subject—English, Foreign Language, Science, Mathematics or Social Studies —under N 9 certificates [8 NYCRR §§ 80.1(a)(11), 80.15 (a)(1)(ii), (b)], or may confine themselves to the academic subjects. 8 NYCRR §§ 80.1(a)(1), 80.16(a)(1)(ii), (b). Since all teachers can be required to instruct outside their certification one day per school week, 8 NYCRR § 80.2(c), and may, if they wish, instruct under more than one certificate, 8 NYCRR § 30.9(c), (d), the Foreign Language teacher may be the Social Studies teacher, periodically or constantly. See discussion p. 11. All teachers are obliged to give the required course components in patriotism, citizenship and American historical

documents to the extent applicable in their grades and to honor the flag and patriotic events. Education Law § 801(1), (2), (3), (4); § 802(1), (2), § 3204(3)(a)(2); 8 NYCRR Part 108, § 109.1. See discussion pp. 9-10.

The district court did not suggest the basis on which the subject matter and teaching responsibilities just described could be reallocated to accommodate non-applicant aliens with permanent certificates, and no practical basis for such reallocation readily appears. However, it is evident that the pupils and boards of education would be denied the complete instructional services they now receive from their teachers under any such plan. Further, the distinctions between citizens and aliens or between aliens and aliens so drawn cannot reasonably be expected to be more precise than the distinctions now drawn by § 3001(3).

The authorization of temporary certificates for certain non-applicant aliens under Education Law §§ 3001-a, 3005 and 8 NYCRR § 80.2(i) is not inconsistent with § 3001(3). Aliens eligible for temporary certificates under 8 NYCRR § 80.2(i)(2) have little impact on the public educational process because their numbers are few (approximately 200 obtain certificates annually) and their certificates are in effect only briefly.* More significantly, § 80.2(i)(2) does not select the "negative example" that § 3001(3) avoids. The alien eligible under § 80.2(i)(2) cannot choose between American and foreign citizenship because of his disability, whereas the alien ineligible under § 3001(3) has chosen inconsistently with the responsibilities of public school teaching by electing foreign citizenship. See discussion p. 25.**

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* Certificates issued under § 80.2(i) are generally valid for five years. E.g. NYCRR §§ 80.15(a)(2), 80.16(a)(2).

** The same analysis applies to Education Law § 3001-a, authorizing temporary certificates for aliens under quota disabilities. Section 80.2(i)(2) is a broader classification encompassing all disabilities. See p. 7, n.1.

Section 80.2(i)(1), authorizing temporary certificates for non-applicant aliens with skills not available from permanently certified teachers, has had no actual effect on the operation of Education Law § 3001(3) because no certificates have been issued. See discussion p. 7, n. 1. The regulation contemplates a situation in which pupils will be denied instruction if a certificate is not issued. The state interests served by § 3001(3) are not opposed by § 80.2 (i)(1) under such emergent circumstances, they simply yield to the then more immediate interest in adequate education for the affected pupils. Section 80.2(i)(1) does not imply that the instruction it authorizes is the same as that provided by teachers qualified under § 3001(3) or § 80.2(i)(2). *Compare* opinion of the district court, A. 45-A. 46. It merely avoids the alternative of no instruction at all.*

Section 80.2(i)(1) is not akin to the waivers noted in *Sugarman* v. *Dougall*, 413 U.S. 634, 643 (1973). Waivers under former New York Civil Service Law § 53(2) admitted non-applicant aliens to a "class" or "classes" of positions during shortages of qualified personnel and permitted them to remain indefinitely.** Its use could have resulted in the employment of large numbers of aliens in face of the statute's purported interest in barring such employment. Section 80.2(i)(1) considers a candidate and a particular instructional need for five years. Its impact on public education will be *de minimis* even if certificates are issued.

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* Section 80.32 of Title 8 NYCRR avoids the same alternative by authorizing the employment of teachers who do not meet educational standards for certification when certified teachers are not available. See p. 7, n.2.

** The term "class," if applied to teachers, would probably encompass all teachers certified in early childhood and upper elementary education (N-6), all teachers certified in English, etc. "Classes" would probably refer to teachers as a profession.

The remaining basis for certifying non-applicant aliens is Education Law § 3005, authorizing temporary certificates for alien exchange teachers. The statute is the reciprocal of § 3001(3) and demonstrates the latter's validity. The alien exchange teacher is invited here to instruct American pupils about the national tradition he represents. To require him to give up his citizenship in order to teach this material would be absurd in view of his purpose here. Equally, if the instructional purpose is the communication of American democratic principles, values and attitudes, the teacher who undertakes the task should share those principles, values and attitudes as § 3001(3) requires.*

The fact that Education Law § 3001(3) does not exclude aliens from teaching in private schools is not a "glaring" example of "imprecision" (opinion of the district court, A. 45) but a recognition of the different objectives of public and private education and of the rights of pupils and their parents to have those objectives met. See discussion pp. 12-13. Private schools instill "values of their own" separate from the "uniquely democratic values" taught in public schools. *Abington School District* v. *Schempp*, 374 U.S. 203, 242 (1963) (BRENNAN, J., concurring). *See* Political Socialization, p. 160; Educating for Citizenship, p. 130. These "values" are predominantly religious.** Curriculum is developed and teachers are qualified to foster the pupils' adherence to the particular religion with which his school identifies. *Lemon* v. *Kurtzman*, 403 U.S. 634-36 (DOUGLAS, J., concurring), noting that "it is well known that every-

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* Education Law § 3005 also illustrates the district court's error in viewing § 3001(3) as limiting the free exchange of ideas in the classroom (A. 48).

** Private education in the United States was sectarian in origin and is overwhelmingly secretarian today. *Abington School District* v. *Schempp, supra,* at 238-40, n. 7. In New York, almost ninety per cent of the private school pupils attend secretarian schools. See p. 13.

thing taught in most parochial schools is taught with the ultimate goal of religious education in mind." *See Wolman* v. *Walter*, 433 U.S. 229, 243-44 (1977); LANG, PREPARATION FOR CITIZENSHIP IN CURRENT COURSES OF STUDY IN CATHOLIC HIGH SCHOOLS 1 (1950). *See also* BOETTNER, ROMAN CATHOLICISM 360 (1962); FICHTER, PAROCHIAL SCHOOLS: A SOCIOLIGICAL STUDY 86 (1958). Curriculum and teacher qualifications in non-sectarian private schools reflect the values and philosophies of their founding educators, or their governing societies, even the national preferences of the parents whose children attend. *See* Political Socialization, p. 160; Educating for Citizenship, p. 130.

Parents select the values their children are taught when they choose public, private sectarian or private non-sectarian education for their children. New York recognizes the constitutional protection that extends to this parental choice* and requires that both sectarian and non-sectarian private schools be left free to determine the character of the education they provide subject only to minimum standards requiring competent instruction in essential subject matter. Education Law § 3204(2). *Judd* v. *Board of Education*, 278 NY 200, 15 N.E. 2d 576, 582, 586 (1938); *Packer Collegiate Institute* v. *University of the State of New York*, 273 App. Div. 203, 76 N.Y.S. 2d 499, 504 (3rd Dept.), *rev'd on other grounds*, 298 N.Y. 184, 81 N.E. 2d 80 (1948) and discussion pp. 12-13.

Minimum standards insure an adequate secular education for all pupils. *Wolman* v. *Walter*, *supra*, at 240; *Levitt* v. *Committee for Public Education*, 413 U.S. 472, 479-80 (1973); *Board of Education* v. *Allen*, 392 U.S. 236 (1968). They do not require that the content of private and pub-

* *See Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972); *Lemon* v. *Kurtzman*, *supra*, at 663 (WHITE, J., dissenting); *Abington School District* v. *Schempp*, *supra*, at 242 (BRENNAN, J., concurring); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

lic education be the same.* They do not require that public and private school teachers possess the same qualifications. Indeed, to establish such requirements would interfere with the separate, constitutionally protected objectives the respective processes serve.

Education Law § 3001(3) and related provisions are limited to the teacher's role in the public school system described herein. Neither their terms nor their legislative histories refer to the regulation of any other profession. See discussion pp. 6-8. The district court nonetheless viewed the provisions as a part of a "comprehensive statutory schema . . . [regulating] a broad range of employment." A. 53, n. 14. The alleged "schema" consists of statutes enacted over a period of eighty years referring to widely divergent professions and trades.** Several have been modified to repeal citizenship requirements.*** Several

* Compulsory Education Law standards for all schools are general, i.e. reading, American history, etc. Education Law § 3204 (3)(a)(1), (2). More specific state requirements, Education Law §§ 801 *et seq.*, distinguish between public and private schools by their terms. For example, courses in citizenship and historical documents offered in private schools need only be similar to those offered in public schools. Education Law § 801(1), (2). Flag exercises, the celebration of patriotic holidays and special courses in federal and state bills of rights are not required at all. Education Law §§ 801(4), 802(1), (2). See pp. 12-13.

** The earliest provision cited by the district court imposed a citizenship requirement for the certification of public accountants in 1896. L. 1896 c. 312 eff. April 17, 1896; repealed L. 1971 c. 987 eff. Sept. 1, 1971, enacting Education Law § 7404(6) (McKinney 1972). The latest provision cited is a citizenship requirement for certification of animal health technicians enacted in 1976. L. 1976 c. 539 § 7 eff. July 1, 1977, adding Education Law § 6711(6) (McKinney's Supp. 1977-78).

*** The citizenship requirement for licensing of certified public accountants, enacted in 1896, was repealed in 1971. L. 1896 c. 312 eff. April 17, 1896; repealed L. 1971 c. 987 eff. Sept. 1, 1971, enacting Education Law § 7404(6) (McKinney 1972). The citizenship requirements for licensing of nurses, L. 1938 c. 472 eff. July

(footnote continued on following page)

contain no citizenship requirements at all or include both citizens and declarants.* As is apparent, these provisions lack comprehensiveness, internal consistency, unity of subject matter and of time of enactment and cannot be fairly characterized as a statutory plan. *See Erlenbaugh* v. *United States,* 409 U.S. 239, 244-46 (1972).

If Education Law § 3001(3) is not now accepted as precisely enforcing New York's interest in training public school children to participate in American democratic society, this case must be remanded for an evidentiary hearing. Appellants offered to prove that the qualifications elicited by § 3001(3) necessarily related to this state interest and that the distinctions drawn were coextensive with the interest and internally consistent (A. 33-A. 34). The district court rejected the offer of proof and awarded summary judgment for appellees. To reach this result, the court had to find adversely to appellants on the necessary relation issue. *See Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542, 544 (1970), precluding summary judgment under Title VII's "demonstrable relation" standard. It did so without hearing proof which, if believed, compelled judgment in favor of appellants. *See Adickes* v. *Kress & Co.,* 398 U.S. 144, 157 (1970); *Sartor* v. *Arkansas Gas Corp.,* 321 U.S. 620, 627 (1944). The court's error in this

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(footnote continued from preceding page)

1, 1938, were repealed by L. 1971 c. 987, eff. Sept. 1, 1971, enacting Education Law § 6904(6) (McKinney 1972). The requirements for psychologists, L. 1956 c. 737 eff. April 17, 1956, were repealed by L. 1971 c. 987 § 2 eff. Sept. 1, 1971, enacting Education Law § 7603(6) (McKinney 1972).

* Citizenship is not required for certification in professional and practical nursing (Education Law §§ 6904, 6905), podiatry (§ 7004), optometry (§ 7104), ophthalmic dispensing (§ 7124) architecture (§ 7304), certified public accountancy (§ 7404), psychology (§ 7603), and social work (§ 7704). The Education Law licenses both citizens and declarants in the following professions: physician (§ 6524), physical therapist (§ 6604), veterinarian (§ 6704), pharmacist (§ 6805), shorthand reporter (§ 7504) and masseur (§ 7804).

regard is revealed by its statements allegedly supporting summary judgment. The court first acknowledges that appellants offered to show that "the non-applicant alien's voluntary decision to retain his native citizenship . . . renders him a negative influence" "in a curriculum that requires imparting principles of American citizenship," A. 47-A. 48, and concludes that no part of the proposed testimony supported the contention that such aliens were "unqualified to teach" in the public schools (A. 48).

CONCLUSION

The Order and Judgment below should be reversed, and Education Law § 3001(3) declared constitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Alternatively, the Order and Judgment should be vacated, and the case remanded for hearing on the necessary relation between the classification established by the statute and New York's interest in educating public school children for participation in American democracy.

Dated: New York, New York
August 7, 1978

Respectfully submitted,

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APPENDIX

Education Law § 3001-a states:

"TEMPORARY TEACHING PERMIT, PERSON NOT A CITIZEN.

A person, not a citizen, who files with the department satisfactory proof that he has filed with the attorney general of the United States a first preference petition pursuant to section two hundred three (a) (1) of the immigration and nationality act [8 U.S.C. 1153 (a)(1)] and that said petition has been approved by such attorney general upon certification by the department of justice, immigration and naturalization service, that he is unable to adjust his status to that of a lawful permanent resident of the United States solely because of an over-subscribed quota to which he is chargeable may receive from the commissioner of education, notwithstanding the provisions of subdivision three of section three thousand one of this chapter, a temporary permit validating his employment in a teaching capacity in the public schools of the state. Such temporary permit shall be valid for one year from the date of issue and may, upon proper application to the commissioner, be once renewed for a further period of one year. Such application shall be in the form required by the commissioner. Such applicant shall not be employed until he shall have taken and subscribed the following oath or affirmation:

'I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability ,the duties of the position of ..... (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned.' The affidavit and oath required by this section shall be administered by the superintendent of schools having jurisdiction over the

school district in which such person is to be employed or his duly authorized representative and shall be filed with the commissioner of education. Copies thereof shall be filed with the superintendent of schools."

Education Law § 3005 states in part:

"LEAVE OF ABSENCE TO TEACHERS FOR TEACHING IN FOREIGN COUNTRIES

"The trustee, trustees or board of education of any school district may permit any teacher having had at least five years service in the school or schools of said district to apply for and receive a leave of absence for a period not to exceed two years for teaching in the schools of a foreign country provided such foreign country shall have agreed to furnish a teacher of corresponding rank or school level to fulfill the duties of the said teacher on leave of absence.

* * *

Notwithstanding any of the provisions of this chapter, when the qualifications of the teacher from the foreign country have been approved by the commissioner of education, he shall be legally entitled to render instructional service in any public school in this state and a permit for a period not to exceed two years for such service shall be issued by the commissioner of education without the payment of fee. * * *"

8 NYCRR § 80.2(i) states:

"Citizenship. A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the appropriate educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons."

Supreme Court, U. S.
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October Term, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA, as Director of the Division of Teacher Education and Certification of the Education Department of the State of New York, and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York,

Appellants,

—against—

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

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OPINION BELOW

The unanimous opinion of the three-judge court is reported at 417 F.Supp. 913 (SDNY 1976) and is reprinted in the Appendix hereto at A 35-53. References herein will be to the Appendix.

QUESTIONS PRESENTED

1. Should Education Law § 3001(3), which limits certification of public school teachers to citizens or aliens who have declared an intent in the future to become citizens, be closely scrutinized because it discriminates against a suspect class or abridges the fundamental rights to academic freedom or to work in the common occupations of the community?

2. Is § 3001(3) narrowly drawn and necessary to achieve a compelling state interest?

3. Is § 3001(3) void under the Supremacy Clause becasue it is inconsistent with both general and specific federal laws regarding the immigration, residence and employment of alien teachers?

4. Does § 3001(3) deny alien teachers due process by creating an irrebuttable

factual presumption that they are unqualified to teach, and by authorizing exceptions within the standardless descretion of the Commissioner of Education?

STATEMENT OF THE CASE

A. Introduction.

In the case of In Re Griffiths, 413 U.S. 717 (1973), this Court ruled that a state could not on the basis of alienage exclude from admission to the bar a permanent resident alien who was "eligible for naturalization" but who had "not filed a declaration of intention to become a citizen" and had "no present intention of doing so." 413 U.S. at 718, n. 1. On the same day it decided Griffiths, this Court summarily affirmed Miranda v. Nelson, 351 F.Supp. 735 (D. Ariz., 1972), aff'd mem. sub nom. Nelson v. Miranda, 413 U.S. 902 (1973). Although the statute found unconstitutional in Miranda barred aliens from a broad range of public jobs, including teaching, one of the two named plaintiffs was specifically seeking employment as a teacher. 351 F. Supp. at 738.

In January of 1977, believing that Griffiths and Miranda governed disposition

of this appeal, and together precluded state efforts to limit public employment as a teacher to citizens or declarant aliens, Appellees filed a brief Motion to Affirm the decision below. Thereafter, the Court announced several important decisions on the rights of aliens, and on May 15, 1978, noted probable jurisdiction. 56 L.Ed.2d 400.

Because this appeal raises important issues that have closely divided the Court in recent months, Appellees will discuss those issues in more detail than they would otherwise consider appropriate.

B. The Facts.

The basic facts are not in dispute. Appellees Norwick and Dachinger are lawfully admitted permanent resident aliens. A 25. Both are married to United States citizens, and both have resided in the United States, and paid federal, state and local taxes for over a decade. A 25. Both received graduate degrees from New York universities. A 5, A 17. Both are qualified in all respects except alienage to teach in public schools in New York. A 26.

Appellee Susan Norwick was born in Dundee, Scotland, and is a citizen of Great Britain. A 49. She has resided in the

United States since 1965, A 6, A 49, and has been married to a United States citizen since 1966. A 5.[1] She is a graduate of North Adams State College in Massachusetts, where she received a B.A. degree summa cum laude. A 5. At the time of the hearing below she was a straight-A graduate student in Developmental Reading at the State University of New York at Albany. A 49. She has since earned an M.S. degree in Developmental Reading at SUNY-Albany, with a straight-A average.

In 1960-61 Appellee Norwick taught in primary schools in Edinburgh, Scotland; from 1961-1965 she taught at the Mount School in London, England; from 1965-1967 she was an editor of The Reading Laboratory in New York City; and for six years, from 1967-1972, she taught at the Riverside Elementary School, a private school in New York City. A 5.

1/ Although the record is silent on the precise dates, Appellee Norwick was admitted to permanent resident status on August 3, 1965, more than thirteen years ago, has resided in the United States since that date, and was married on December 11, 1966. Her husband has been a practicing attorney in New York since 1965.

Appellee Tarja Dachinger was born in Turku, Finland, and remains a citizen of that country. A 17. She graduated from Lehman College, a unit of the City University of New York, where she received a B.A. degree cum laude and an M.S. degree in Early Childhood Education.[2] She was married to a United States citizen in 1966 and has resided in this country since then. A 17-18. She was employed as a teacher during 1966, 1967 and 1970 at the Victory Day Care Center in New York City. A 17.

In short, both Appellees have superior academic qualifications to teach in New York's public schools. Both have taught in schools in New York with untarnished records, and both have advised the state they are willing to subscribe to the oath to support the state and federal constitutions required of all public school teachers by Education Law § 3002. A 25.

2/ It is ironic, and little short of irrational, that Appellants are attempting to prevent Appellees from using on the state's behalf precisely those skills they acquired at institutions of higher education in New York, in programs supported in whole or in large part by state funds. Presumably, a chief reason for such subsidization is that such higher studies "in the long run will be a benefit to the State." Nyquist v. Mauclet, 432 U.S. 1, 13-14 (1977) (Burger, C.J., dissenting).

Appellees applied for certificates to teach in public schools in New York. A 26. Their applications were denied by Appellants and their predecessors on the basis of alienage, pursuant to New York Education Law § 3001(3). A 26.

C. The Statutory Scheme

The text of the relevant statutes and regulations is set forth in the opinion below, A 49-50, and in the Appendix to Appellants' Brief. The principal statute, Education Law § 3001(3), provides as follows:

> "Qualifications of Teachers
>
> "No person shall be employed or authorized to teach in the public schools of this state who is:
>
> * * *
>
> "3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply, after July first, nineteen hundred sixty-seven, to an alien teacher emplcyed pursuant to regulations adopted by the commissioner of education permitting such employment."

Section 3001(3) has three clauses. The first, which requires that public school teachers be citizens, was adopted in 1918, (Appellants' Brief at 7), a time of intense hostility towards aliens.[3/]

The second clause, enacted in 1922 (Appellants' Brief at 7), provides that public school teachers do not have to be citizens if they make "due application to become a citizen and thereafter within the time prescribed by law shall become a citizen." The application is made by filing with the federal government a "declaration of intention" to become a citizen, so teachers who qualify under this clause are commonly referred to as "declarant aliens." Those who would be eligible to file a declaration but have not done so are commonly referred to as non-declarant aliens. Not all aliens are eligible to file a declaration of intention. Only permanent resident aliens are eligible to file declarations of intention. If they are not married to a United States citizen, they must reside in the United States for five years before they

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3/ B. Schrieke, Alien Americans (Viking, 1936), pp. 78-80; G. Stephenson, A History of American Immigration 1820-1924 (Athenium, 2d ed., 1964), pp. 224-237.

are eligible to file a petition for naturalization.[4/] If married to a citizen, they must reside here three years before they can petition for naturalization.[5/] Even then it may take 1-2 years to complete the naturalization process.

The third clause of § 3001(3), adopted in 1967 (Appellants' Brief at 7), provides that the citizenship or declarant alien requirements "shall not apply" after July 1, 1967 "to an alien teacher employed pursuant to regulations adopted by the commissioner of education permitting such employment." The legislative history of the 1967 amendment is extremely sparse. Although Appellants assert that the third clause authorizes only "temporary" certificates (Appellants' Brief at 8), the wording of the statute contains no such limitation and there is no House or Senate report or floor debate to indicate the legislature intended such a limitation. For present purposes,

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4/ 8 U.S.C. § 1427.

5/ 8 U.S.C. § 1430(a)

however, it is unnecessary to decide whether the third clause authorizes permanent or only temporary certificates, because Appellant Norwick was denied even a temporary or provisional certificate (Appellants' Brief at 4; A 6-7; A 26.)

The important point, for present purposes, is that the third clause of § 3001(3) clearly authorizes the commissioner of education to issue at least a temporary certificate to a non-declarant alien, even if the alien would be eligible to file a declaration of intent. The succeeding statute, Education Law § 3001-a (A 49), adopted in 1965 (Appellants' Brief at 7), already authorized temporary certificates for aliens who were not permanent resident aliens and thus not eligible to file declarations of intent.

Other relevant statutes require that both citizens and those aliens who are permitted to teach in public schools take an oath to support the federal and state constitutions. Education Law §§ 3001-a and 3002. As noted, Appellees have offered to take that oath.

Education Law § 2590-c, adopted in 1969,[6/] authorizes aliens to vote for

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6/ New York Laws, 1969, ch. 330, Art. 52-A.

and serve as members of community school boards, which hire and fire teachers, set curriculum, and govern the public schools. See A 27-32 and discussion infra, Point II, B.2.

SUMMARY OF ARGUMENT

Education Law § 3001(3) should be closely scrutinized because it discriminates against aliens, a suspect class. Point I.A. The Court's ruling in Nyquist v. Mauclet, 432 U.S. 1 (1977), that non-declarant aliens are a suspect class, governs the standard of review applicable here. I.A.1. The "political community" exception to strict scrutiny announced for police officers in Foley v. Connelie, 55 L.Ed.2d 287 (1978), is inapplicable to the facts of this case because, under New York law, teachers are not part of the political community. I.A.2. Furthermore, teachers do not share as many of the characteristics of police officers as do attorneys, and attorneys do not come within the political community exception. In Re Griffiths, 413 U.S. 717 (1973). I.A.2.

Strict scrutiny is also required because the statute abridges the fundamental rights of academic freedom (I.B.), and the right to work in the common occupations of

the community. I.C.

Education Law § 3001(3) does not promote a substantial state interest (II.A.), and is not necessary. II.B.2. The New York legislature has disclaimed any interest in excluding alien teachers from public schools (II.B.1.), and has even authorized aliens to govern public schools. II.B.2. New York permits non-declarant aliens to teach in private schools, which shows that declarant status is not necessary to insure that students learn democratic principles. II. B.3. The oath to support the constitution, required by the legislature even for citizen teachers, satisfies any legitimate state interest in loyalty, and Appellees are willing to take that oath. II.B.4. The experience of other states shows that § 3001(3) is not necessary. II.B.5. Indeed, § 3001(3) does not even rationally advance a legitimate state interest. II.B.6.

Section 3001(3) is inconsistent with settled principles of education and academic freedom. II.C.

The statute is not narrowly or precisely drawn. It is both underinclusive and overinclusive, and prohibits an alien from any country from teaching any subject

at any grade level. II. D.

Section 3001(3) is void under the Supremacy Clause because it is inconsistent with both general and specific federal laws regulating the employment of alien teachers. III.

Section 3001(3) violates the due process clause because it creates an irrebuttable factual presumption that non-declarant aliens are not qualified to teach, and because it authorizes exceptions to be granted or withheld within the standardless discretion of Appellants. IV.

ARGUMENT

I. EDUCATION LAW §3001(3) SHOULD BE REVIEWED UNDER A STRICT STANDARD WHICH PLACES ON THE STATE A HEAVY BURDEN OF JUSTIFICATION.

This Court has required strict scrutiny when a statute either discriminates against a suspect class or abridges a fundamental right. Education Law §3001(3) does both. It discriminates against aliens, a suspect class, and abridges two fundamental rights, the right to academic freedom and the right to work in the common occupations of the community. Accordingly, there are three reasons for subjecting this statute to close

judicial scrutiny.

A. Section 3001(3) Should Be Subjected To Strict Scrutiny Because It Classifies Teachers on The Basis of Alienage, A Suspect Classification.

The reference to "person" in the Fourteenth Amendment's Equal Protection Clause includes aliens. Graham v. Richardson, 403 U.S. 365, 371 (1971). "Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders." Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306, 309, n. 5 (1970), quoting from Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring).

> "All persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws." Takahashi v. Fish & Game Commission, 334 U.S. 410, 420 (1948).

This Court has held, without dissent, that

> classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a "discrete and insular

minority" (see United States v. Carolene Products Co., 304 U.S. 144, 152, 153 n. 4 (1938)) for whom such heightened judicial solicitude is appropriate.

Graham v. Richardson, 403 U.S. at 372.7/

The Court has recognized at least three separate grounds for determining whether a classification is suspect. The Court will inquire whether the class "is...saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973) (emphasis added). It is not necessary that the class qualify as suspect under all three grounds. Blacks, for example, are a suspect class even though they can now vote and are no longer politically powerless. But aliens qualify as a suspect class under all three grounds.

7/ See, to the same effect, Nyquist v. Mauclet, 432 U.S. 1 (1977); Sugarman v. Dougall, 413 U.S. 634 (1973); Examining Board v. Flores de Otero, 426 U.S. 572 (1976); and In re Griffiths, 413 U.S. 717 (1973).

First, aliens are saddled with disabilities, both de jure and de facto. The very word alien is stigmatizing and is often used pejoratively.8/

Second, aliens have been subjected to a history of purposeful unequal treatment.9/

8/ The stigma attached to alienage is not a forgotten remnant of the past. As recently as 1973 a city in New York sought, unsuccessfully, to prohibit aliens from driving taxicabs on the ground that aliens "may be more inclined than citizens to avail themselves of the opportunity to partake or promote criminal activities." Sundram v. City of Niagara Falls, 7 Misc. 2d 1002, 1005, 357 N.Y.S. 2d 943,946 (Sup. Ct. 1973), aff'd mem., 44 App. Div. 2d 906, 356 N.Y.S. 2d 1023 (4th De't 1974). See also, Raffaelli v. Committee of Bar Examiners, 7 Cal. 2d 288, 291, 496 P. 2d 1264, 101 Cal. Rptr. 896 (1972) (en banc).

9/ See, e.g., the cases cited in Sugarman, 413 U.S. at 644 & n. 11 (1973). See also M. Konvitz, The Alien and the Asiatic in American Law, Ch. 6 (1946); and Schrieke and Stephenson, supra n. 3. The exclusion of aliens from nearly all forms of public employment in many states, including New York, during the beginning of this century was a direct consequence of their political powerlessness. See People v. Crane, 214 N.Y. 154, 108 N.E. 427, aff'd sub nom. Crane v. New York, 239 U.S. 195 (1915), where Justice Cardozo upheld a law forbidding aliens from holding public employment. The special "public interest" doctrine relied upon to uphold such discrimination was rejected in Graham v. Richardson, 403 U.S. 365 (1971).

Third, and most important, aliens are politically powerless. They cannot vote. Sugarman v. Dougall, 413 U.S. at 648; Skafte v. Rorex, 553 P. 2d 830 (Colo. 1976), appeal dismissed, 430 U.S. 961 (1977). And because they do not have the opportunity to trade political support, they are "shut out" of the political process.10/

To justify a suspect classification the state must demonstrate that its purpose or interest is constitutionally permissible and substantial, and that the classification is "necessary...to the accomplishment" of its purpose or the safeguarding of its interest. In re Griffiths, 413 U.S. at 721-722. See also, Examining Board v. Flores de Otero, 426 U.S. at 605. Although the state interest required to satisfy the strict scrutiny standard has been variously characterized as "overriding," McLaughlin v. Florida, 379 U.S. 184, 196(1964); "compelling," Graham v. Richardson, 403 U.S. at 375; "important," Dunn v. Blumstein, 405

10/ See generally, G. Rosberg, "The Protection of Aliens From Discriminatory Treatment By The National Government," The Supreme Court Review, 275 at 304 and n. 116 (1977).

U.S. 330, 343 (1972); or "substantial," In re Griffiths, 413 U.S. at 722, this Court has indicated that "no particular significance" is to be attached to these differences in articulating the test. Griffiths, 413 U.S. at 722, n. 9. What the Constitution demands is that

> The government interest claimed to justify the discrimination is to be carefully examined in order to determine whether that interest is legitimate and substantial, and inquiry must be made whether the means adopted to achieve the goal are necessary and precisely drawn. Examining Board v. Flores de Otero, 426 U.S. at 605.

Appellants offer only two contentions why the strict scrutiny standard should not be applied in this case. First, they contend that because some alien teachers can remove themselves from the suspect class by filing a declaration of intent to become a citizen, the "principal basis" for strict scrutiny is not presented. Appellants' Brief at 18-19. Second, they contend that a test of reasonableness is sufficient because §3001(3) is necessary "to preserve the basic conception of a political community." Foley v. Connelie, ___U.S. ____, 55 L. Ed. 2d. 287, 292 (1978), quoting

Sugarman v. Dougall, 413 U.S. at 647. Appellants' Brief at 18. The first contention has been both implicitly and explicitly rejected by this Court. The second is inapplicable to the facts of this case.

1. If a classification burdens only aliens, the classification is suspect even if class members can by their voluntary act remove themselves from the disadvantaged class.

Appellants are seeking to reargue the precise point raised and rejected in Nyquist v. Mauclet, 432 U.S. 1, (1977). In effect, they ask the Court to overrule Mauclet. There, the same attorneys, representing the same Commissioner of Education named as a defendant below, argued that aliens who are disadvantaged by a statute unless they declare their intention to become citizens should not be considered a suspect class. That argument was explicitly rejected in Mauclet, and Appellants have advanced no reason why that case, decided less than fifteen months ago, should be overruled.11/

11/ See also, Matthews v. Lucas, 427 U.S. 495, 504 n. 11 (1976); and see, Monell v. New York City Dept. of Social services, 56 L.Ed.2d 611, 650-653 (1978) (Rehnquist, J., dissenting).

Here, as in Mauclet, "the important points are that [the statute] is directed at aliens and only aliens are harmed by it. The fact that the statute is not an absolute bar does not mean that it does not discriminate against a class." Mauclet, 432 U.S. at 9.

Further, as the Court noted in Mauclet, Appellants' position was implicitly rejected in several alienage cases dating back to 1973.12/

12/ "Our Brother Rehnquist argues in dissent that strict scrutiny is inappropriate because under §661(3) a resident alien can voluntarily withdraw from disfavored status. But this aspect of the statute hardly distinguishes our past decisions. By the logic of the dissenting opinion, the suspect class for alienage would be defined to include at most only those who have resided in this country for less than five years, since after that time, if not before, resident aliens are generally eligible to become citizens. 8 USC §1427(a) [8 USCS §1427(a)]. The Court has never suggested, however, that the suspect class is to be defined so narrowly. In fact, the element of voluntariness in a resident alien's retention of alien status is a recognized element in several of the Court's decisions. For example, the Court acknowledged that Griffiths involved an appellant who was eligible for citizenship, but who had not

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Essentially, §3001(3) imposes a political loyalty test on aliens that is not imposed on citizens. If the statute provided that black teachers, but not white teachers, would have to take a political loyalty oath, the statute would create a suspect class even though all black teachers could voluntarily remove themselves from

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filed a declaration of intention to become a citizen, and had 'no present intention of doing so.' 413 U.S., at 718 n. 1, 37 L.Ed.2d 910, 93 S. Ct. 2851. And insofar as the record revealed, nothing precluded the appellees in Sugarman v. Dougall from applying for citizenship. 413 U.S. at 650, 37 L.Ed. 2d 853, 93 S. Ct. 2842 (Rehnquist, J., dissenting). Mr. Justice Rehnquist argued in dissent there, just as he does here today, that strict scrutiny was inappropriate in those cases because there was nothing to indicate that the aliens' status 'cannot be changed by their affirmative acts.' Id., at 657, 37 L.Ed.2d 853, 93 S. Ct. 2842. Nonetheless, the Court applied strict scrutiny in the cases. We see no reason to depart from them now." Mauclet, 432 U.S. at 9, n. 11.

the disadvantaged class by taking the oath.13/

Similarly, even if a suspect class is not involved, statutes which burden a fundamental right (see Points I.B. and I.C. infra)will be strictly scrutinized even though all members of the disadvantaged class can voluntarily remove themselves from the class. Thus, a statute requiring that all teachers be protestants would be strictly scrutinized, even though all non-protestant teachers could renounce their religions and voluntarily become protestants.

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13 See to the same effect in an analogous context, Rosberg, supra n. 10 at 290 (1977):

> "It is simply not correct to say that the discrimination is within the class of aliens rather than between citizens and aliens. The statute imposes on all aliens a qualification for admission to the program that is applicable to no citizen, a requirement that they demonstrate their "affinity" with the United States by proving that they have been admitted to the United States for permanent residence and have resided here for five years. Even though some aliens can satisfy the additional qualification, the fact remains that all aliens are judged under a distinct standard. If the statute governing eligibility in the insurance program imposed a durational residence requirement on blacks but not on whites, the Court could not avoid

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Thus, both stare decisis and cogent reasons compel rejection of Appellants' oft-rejected argument on this point.14/

> strict scrutiny on the theory that, since some blacks will satisfy the extra requirement, the discrimination is really within the class of blacks."

14/ Mauclet, though a 5-4 decision, is now the law of the land on this point. All lower court judges would now be required to apply a strict scrutiny standard when analyzing statutory discriminations against aliens, even if some aliens could remove themselves from the disadvantaged class by filing a declaration of intent to become a citizen. Appellees respectfully suggest that until Mauclet is overruled, the four justices who dissented in Mauclet (Mr. Chief Justice Burger, Mr. Justice Stewart, Mr. Justice Powell, and Mr. Justice Rehnquist), have an "institutional duty" to apply the strict scrutiny standard to analysis of this statutory discrimination, and to all other statutes which discriminate against non-declarant aliens. As Mr. Justice Stewart ruled in Hudgens v. NLRB, 424 U.S. 507, 518 (1976): "It matters not that some Members of the Court may continue to believe that the Logan Valley case was rightly decided. Our institutional duty is to follow until changed the law as it now is, not as some Members of the Court might wish it to be." (footnote omitted). Mr. Chief Justice Burger, Mr. Justice Powell and Mr. Justice Rehnquist joined in that opinion. See also, Gosa v. Mayden, 413 U.S. 665, 692 (1973) (Mr. Justice Rehnquist, concurring).

2. The "political community" exception is not applicable to the facts of this case.

This Court suggested in dicta in Sugarman, 413 U.S. at 648, and held in Foley, 55 L. Ed. 2d at 292-293, that exclusion of aliens from some positions necessary to preserve "the basic conception of a political community" is not suspect and will not require strict scrutiny. Under this exception to the general rule requiring strict scrutiny, certain rights than can, in general, be described as "political" rights, as opposed to "civil" rights, can be denied to aliens even if the state cannot show a compelling need for the denial.15/

The "political community" exception is important, but narrow. It permits a lower standard of review in alienage cases which involve "the qualification of voters," "persons holding state elective or important nonelective executive, legislative,

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15/ Appellees respectfully suggest that creating different standards of review for the same suspect class, depending on the nature of the position or right abridged, is unnecessary, blurs the distinction between the standard of review to be applied and the justification on the merits for the abridgement, and provides little guidance for lower courts. The Court could have

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and judicial positions," or "officers who participate directly in the formulation, execution, or review of broad public policy," because those rights and positions "go to the heart of representative government." Sugarman, 413 U.S. at 647 (emphasis added).

Given the sweep of anti-alien laws New York has enacted and defended, including laws requiring citizenship for veterinarians and masseurs, any claim that §3001(3) was enacted to preserve the "political community" should itself be closely scrutinized. See note 59 infra and accompanying text. In any event, the "political community" exception is not applicable to the facts of this case. None of the elements thought important in Sugarman or Foley is present in this case.

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ruled in Foley, supra, that a statute limiting the position of state police officers to citizens will be strictly scrutinized, and then ruled that the state does have a compelling need to limit that position to citizens. That approach would avoid the necessity of deciding, on the merits, whether a particular position or right falls within the "political community" exception before deciding the standard of review to be applied in deciding the merits.

Like all the positions which cannot be reserved for citizens,[16] and unlike those which can,[17] teaching is not a governmental monopoly. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Furthermore, New York law is clear, in decisions by the courts and by the Attorney General, that teachers are "employees," not officers, and do not "exercise any sovereign power or discharge any judicial duties."[18] This authoritative construction of New York law should be sufficient to find that at least in New York, teachers are not considered so close to the heart of government as to come within the "political community" exception. But even apart from those constructions, teachers do not share the characteristics thought relevant in Foley.

16/ E.g., civil servants, Sugarman v. Dougall, supra, attorneys, In re Griffiths, supra; and engineers, Examining Board v. Flores de Otero, supra.

17/ Jurors, Perkins v. Smith, 370 F.Supp. 134 (D. Md. 1974); aff'd, 426 U.S. 913 (1976); voters, Skafte v. Rorex, supra; police officers, Foley V. Connelie, supra.

18/ As the Court stated in Matter of Corsall v. Gover, 10 Misc. 2d 664, 667-669, 174 NYS 2d 62, 65-66 (1958), a law prohibiting the

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holding of two "offices" did not prevent a teacher from simultaneously serving as Mayor:

> "Petitioner's position as a teacher had no earmarks of officialdom and it is totally lacking in official characteristics. ... A teacher does not exercise any sovereign power or discharge any judicial duties with respect to the functions and duties of the board in its control and management of the Public School System... [A] teacher [is] required and obliged to follow the curriculum established by the Board, to attend classes assigned to him...and to practice good behavior and to render efficient and competent service. ... [H]is employment is by contract with the Board. ... Above all...a teacher is under the supervision of the Superintendent...and the principal. ...
>
> This court is of the opinion that the position of teacher is not a public office. ... He is an employee of the board."

The Attorney General of the State of New York, who represents Appellants here, has repeatedly agreed, formally concluding on numerous occasions that teaching is not a public office, and that teachers are not officers, but employees. See e.g., 1963 Op. Att. Gen. 196 ("a school teacher is not a civil or public officer but an employee..."); 1967 Op. Att. Gen. 60 (same); 1975 Op. Atty. Gen. 230 and 281 (same); compare, 1975 Op. Atty. Gen. 100 (special patrolmen are officers, not employees).

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In Foley, the Court stressed that the police function is "one of the basic functions of government;" that police "exercise an almost infinite variety of discretionary powers;" that police "invade" the constitutionally protected "privacy" of individuals in "public places," private dwellings and on public highways in order to "search" and "arrest" individuals, often using "lawful force" and "weapons;" that abuse of police authority "can have serious impact on individuals;" that the police function is not one of the "common occupations of the community;" that police exercise "broad power over people generally;" and that "most states expressly confine the employment of police officers to citizens." Foley, 55 L. Ed. 2d at 293-294.

Apparently, other states also consider teachers to be employees, not officers. E.g., Michigan Attorney General Opinion No. 4925, Jan. 16, 1976: "Elementary and secondary school teachers are not 'officers who participate directly in the formulation, execution, or review of broad public policy.' Sugarman, supra. It would appear that the state, consequently, has no judicially recognized justification for the imposition of this broad citizenship requirement." See, to the same effect, the opinion of the Pennsylvania Attorney General quoted infra, n. 19.

In contrast, although education is extremely important, this Court has ruled it is not a fundamental right, or a mandatory function of government. San Antonio School District v. Rodriguez, 411 U.S. 1, 37 (1973).[19] The discretion of teachers is strictly limited by curriculum requirements and by the supervision of the superintendent and principal. Matter of Corsall v. Gover, supra n. 18. Teachers do not search or arrest individuals in public places, or private dwellings, and they do not carry weapons. Abuse of their authority does not have the same serious impact on life, limb or liberty that police abuse

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19/ See, to the same effect, 1973 Opinions of the Pennsylvania Attorney General 19, at 20 (Official Opinion No. 9, Jan. 16, 1973): "They [Supreme Court decisions] indicate that aliens may be barred from an occupational field only when loyalty and detailed familiarity with American culture are necessary qualifications for a position closely linked to uniquely governmental functions, such as the administration of justice or the conduct of foreign policy. ...Teaching, like medicine, is an important profession, but it is not a central governmental function like the operation of foreign policy or the administration of justice. These latter functions, for example, are never entrusted to private institutions as teaching often is in the United States."

can occasion.[20] Teaching is one of the common occupations of the community (see Point I. C. infra). Teachers exercise limited control over pupils in the classroom, but they do not exercise "broad power over people generally." Finally, "most states" do not limit the employment of teachers to citizens (see Point II. B. 5., infra).

Attorneys share more of the characteristics thought relevant in Foley than do teachers, but attorneys do not come within the "political community" exception. As the Court noted in Griffiths, in Connecticut lawyers were, by statute, "officers of the court"; they could invade individual privacy through issuance of subpoenas and compelled depositions; and they could even

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20/ In addition, the Court has previously noted that the "openness of the public school and its supervision by the community" affords significant safeguards against abuses by teachers of their pupils' rights. Ingraham v. Wright, 430 U.S. 651, 670 (1977). In contrast, of course, no similar protections surround the individual's encounter with a policeman on a public highway, or in private dwellings. Furthermore, a teacher's contact with pupils is almost always in the presence of other teachers, student teachers and teachers' aides.

"command the assistance" of peace officers. Griffiths, 413 U.S. at 723. Lawyers necessarily exercise very broad discretion; abuse of their authority can have severe consequences for their clients and for others; and the practice of law is a far less common occupation than is teaching. As Mr. Justice Powell, who authored the opinion in Griffiths, later wrote for the Court in In Re Primus, U.S. , 56 L. Ed. 2d 717, 428 (1978):

> "[T]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" [citing Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)].

Accordingly, if lawyers do not come within the "political community" exception, it follows a fortiorari that teachers do not.

Courts and attorneys general have subjected discriminations against teachers to strict scrutiny. In Miranda v. Nelson, 351 F.Supp. 735 (D. Ariz. 1972), for example, a three-judge court strictly scrutinized a statute that limited many jobs to

citizens, including the teaching job sought by one of the named plaintiffs. That decision was summarily affirmed by this Court. 413 U.S. 902 (1973). And in Younus v. Shabat, 336 F.Supp. 1137 (N.D. Ill. 1971), aff'd in an unpublished opinion, (7th Cir., Jan. 3, 1973, No. 72-1051), the courts strictly scrutinized restrictions on granting tenure to alien teachers.

Similarly, several Attorneys General have concluded that discriminations against alien teachers should be subjected to strict scrutiny.[21/]

B. Section 3001(3) Should Be Subjected to Strict Scrutiny Because It Abridges the Fundamental Right of Academic Freedom.

Even if §3001(3) were not subject to strict scrutiny on the ground that it embodies a suspect classification, it would

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21/ See, for example, California, 53 Op. Att. Gen. 63, Opinion No. 69-199, Feb. 6, 1970; New Jersey, Attorney General Formal Opinion No. 10, Sept. 23, 1974; Pennsylvania, 1973 Opinions of the Attorney General 19, Opinion No. 9, Jan. 16, 1973; and Michigan, Opinion No. 4925, Jan. 16, 1976. The Attorney General of Massachusetts has advised the Massachusetts Commissioner of

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be subject to strict scrutiny on First Amendment grounds. Section 3001(3) directly affects academic freedom, "which is of transcendent value to all of us and not merely to the teachers concerned," and thus must be justified by a compelling state interest. Keyishian v. Board of Regents, 385 U.S. 589, 603-604 (1967); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Sweezy v. New Hampshire 354 U.S. 234, 250 (1957). See also Pickering v. Board of Education, 391 U.S. 563 (1968); Epperson v. Arkansas, 393 U.S. 97 (1968).

As Appellees will demonstrate infra, Point II. C., the "paramount" objective of academic freedom is to insure a "robust exchange of ideas." Regents of the University of California v. Bakke, _____U.S._____, 57 L. Ed. 2d 750 at 786 (1978) (Powell, J.). For that reason, this Court has closely

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Education that "the citizenship provisions of the teachers' certification statute are unconstitutional," without describing the standard of review applied. Letter of Oct. 29, 1974 from Walter H. Mayo III, Assistant Attorney General, to Gregory R. Anrig, Commissioner of Education. See also, Virginia (1973) Report of the Attorney General, p. 284 (Aug. 3, 1973); and Georgia, Opinion No. 76-74 (July 12, 1976).

scrutinized loyalty oaths for teachers,[22] and state efforts to "standardize" or "cast a pall of orthodoxy over the classroom." [23]

The same academic freedom interests are at issue here, and the same strict scrutiny should be employed to determine whether the state has a compelling need to abridge those interests.

C. Section 3001(3) Should Be Subjected to Strict Scrutiny Because It Abridges the Fundamental Right to Work for a Living in the Common Occupations of the Community.

In Truax v. Raich, 239 U.S. 33, 41 (1915), this Court ruled that it would closely examine state statutes infringing the liberty of all persons, including aliens,

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22/ Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234 (1957).

23/ Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1923); Baggett v. Bullitt, 377 U.S. 360 (1964); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). See also, Van Alstyne, "The Constitutional Rights of Teachers and Professors," 1970 Duke L. J. 841; Note, "Academic Freedom in the Public Schools: The Right to Teach," 48 N.Y.U.L. Rev. 1176 (1973).

to work in the common occupations of the community. In a justly celebrated statement of the fundamental nature of the right to work, the Court observed (239 U.S. at 41):

> It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [citations omitted] If this could be refused solely upon the ground of race or nationality, the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words.

This Court has repeatedly reaffirmed Truax. See Griffiths, Sugarman, and Flores, supra, holding that the Fourteenth Amendment protects aliens' right to work as attorneys, civil servants and engineers.[24/] And in

24/ In both Sugarman and Flores, the Court expressly relied on Truax, citing the "common occupation" holding. 413 U.S. at 641; 426 U.S. at 604. See, to the same effect, Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The phrase "right to work," like the phrases "right to travel," "right to privacy," etc., is a short-hand way of describing constitutional limits on governmental authority. More precisely, job applicants have a right not to be denied employment or denied consideration for employment, because of govern-
(FN 24 continued on next page)

holding that states could limit employment as a police officer to citizens, the Court took care to emphasize that police employment is not a common occupation. Foley, 55 L.Ed.2d at 294.[25/]

By any measure, teaching is a "common occupation." Few occupations of any sort, and apparently no public occupations, employ more persons.[26/]

There are good reasons "for this solicitude with respect to an alien's engaging in an otherwise lawful occupation." Flores 426 U.S. at 604. As Mr. Chief Justice Burger observed in Mauclet, 432 U.S. (1977) (dissenting), most of the Court's alienage cases "involved statutes which prohibited aliens from engaging in certain occupations or professions, thereby impairing their

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mental rules or classifications based on the applicant's status, or on other considerations unrelated to ability to perform the job.

25/ "A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment or other 'common occupations of the community ....' "

26/ Statistics collected by the New York State Department of Labor show that in 1974,
(FN 26 continued on next page)

ability to earn a livelihood, "depriving them of "the essential means of economic

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the last year for which actual figures are available, teaching (316,560 persons) was the third largest occupation in New York, following only stenographers, typists, and secretaries (491,222), and sales representatives and sales workers (375,918).

Teachers are far more common than technical engineers (98,064), accountants (91,299), social workers (43,584), medical workers (170,175), construction craft workers (227, 983), food service workers (270,465), or even laborers (293,539). New York State Department of Labor, Occupations Projections, New York State, 1974-1985 (1978), at 32-46. (The figures for teachers include 56,629 college and university teachers).

In New York, teaching is also apparently the largest single category of public employment. In 1977, there were 170,706 public school teachers. By contrast, in 1974, the public sector employed far fewer transit workers (35,451), police and detectives (70,648), and public administrators and public inspectors (69,052). New York Dept. of Labor, op. cit., at 32-47. In 1977, 1,259,400 persons worked for New York State or local government. New York State Dept. of Labor, Division of Research and Statistics, Bureau of Labor Market Information. Thus, teachers in public schools and universities constitute approximately 13.5% of all public employees in New York State.

survival," and thus abridging "a fundamental personal interest...." (emphasis in original). In addition to this fundamental personal interest in employment, there is also a strong public interest in permitting aliens to work in common occupations, because aliens who cannot work will be entitled to welfare benefits, at public expense. Graham v. Richardson, supra. 27/ Conversely, permanent resident aliens who are permitted to work support public programs through payment of federal, state and local taxes. Sugarman, 413 U.S. at 645; Griffiths, 413 U.S. at 722.

Furthermore, as discussed in more detail infra Point III, aliens granted

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27/ In Hampton v. Mow Sun Wong, 426 U.S. 88, 115 (1976), the Court acknowledged "the public interest in avoiding the wholesale deprivation of employment opportunities" to aliens.

the status of permanent resident aliens are authorized by Congress to live and work anywhere in the United States, and many permanent resident aliens acquire that status only after a federal determination that the alien's intended employment --expressly including teaching-- will benefit the United States.[28/] Because aliens cannot live where they cannot work, restrictions on employment may conflict with or at least frustrate federal policies. Thus, employment restrictions should be closely scrutinized.[29/]

Summary of Point I. Education law § 3001(3) discriminates against a suspect class. It abridges the fundamental rights of academic

28/ See generally, Carliner, The Rights of Aliens (Avon/Discus, 1977), pp. 28-34. See also, 8 U.S.C. § 1182(a) (14); 8 U.S.C. § 1101(a) (32); 8 C.F.R. §§ 204.1(c) and 204.2(e) (4).

29/ See, for example, Rosberg, supra n.10 at 315: "calling alienage a suspect classification may be just another way of saying that federal law implicitly requires the states, except in cases of special need, to accord resident aliens the same treatment as citizens."

freedom and the right to work in the common occupations of the community. For each of these reasons, the statute should be subjected to strict scrutiny, and the state should be required to meet a heavy burden of justification. Furthermore, even if any one reason were not alone sufficient to require strict scrutiny, in the circumstances of this case, the collective force of these reasons requires strict scrutiny.

II. EDUCATION LAW § 3001(3) DOES NOT PROMOTE A PERMISSIBLE AND SUBSTANTIAL STATE PURPOSE OR INTEREST, IS NOT NECESSARY, AND IS NOT NARROWLY AND PRECISELY DRAWN.

Appellants have limited their defense to a single state interest said to be compelling and precisely furthered by § 3001 (3). As stated in their offer of proof:

> [A]liens who voluntarily refuse naturalization and thereby choose to continue their allegiance to another nation and their identification with the political tradition, culture and mores of the nation are not appropriate teachers in a curriculum that requires imparting principles of American citizenship. A 34. See also, Appellants' Brief at 25, 29.

As we shall demonstrate, Appellants have not shown, as they must, that the state's "purpose or interest is both constitutionally permissible and substantial," (Point II. A.), and that its use of the classification is "necessary to the accomplishment" of "its purpose or the safeguarding of its interest" (Point II. B.). Griffiths, 413 U.S. at 721-23. And they have not shown that the means employed were "precisely drawn in light of the acknowledged purpose" (Point II. C.),

Sugarman, 413 U.S. at 643.

A. The State's Purpose And Interest Are Not Permissible Or Substantial.

The purpose of Education Law § 3001 (3) is to compel or induce alien teachers to demonstrate national affinity by becoming citizens in order to protect the state's asserted interest in requiring that all teachers "identify with the democratic principles, values and attitudes they will teach from curriculum materials and by their own example." Appellants' Brief at 25.

1. Compelling or inducing aliens to demonstrate national affinity by becoming citizens is not a permissible state purpose.

This Court's decision in Mauclet is directly controlling on this point. There, as here, New York limited benefits to citizens and declarant aliens and said the purpose of the limitation was to insure national affinity. Although it might be permissible for the federal government to compel citizenship, the federal government has chosen not to do so. As the Court noted in Mauclet,

federal law permits resident aliens to petition for naturalization, usually after five years' residence, but it does not require them to do so. Mauclet, 432 U.S. at 7, n. 8. Accordingly, the Court ruled that compelling or inducing citizenship is not, for a state, a permissible purpose (432 U.S. at 10):

> Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere. U.S. Const., Art. I, § 8, cl. 4.30/

2. Requiring teachers to "identify" with certain homogeneous principles, values and attitudes is not a permissible state interest.

Two points must be stressed. First, imparting democratic principles, values and attitudes is certainly a permissible state interest. Whether Education Law § 3001(3) is either appropriate or necessary to achieve that interest will be discussed infra, Point II. B. In this Section, however, Appellees will show that requiring all teachers to "identify" with

30/ See, to the same effect, Hines v. Davidowitz, 312 U.S. 52, 68 (1941); DeCanas v. Bica, 424 U.S. 351, 354 (1976).

those principles is not a permissible state interest.

Second, Appellees do identify with democratic principles, values and attitudes, and if permitted to so so would impart those principles to their public students, as Appellee Norwick has done with private students for six years.31/ Assuming arguendo,

31/ The fact that an alien has not yet decided to "renounce" foreign citizenship does not mean that aliens cannot identify with democratic principles. Griffiths, 413 U.S. at 724-726 and accompanying notes. There are many reasons for not renouncing citizenship in an alien's native land. Individuals may have strong emotional ties to the place of their birth, and may not want to "close a door to the past." Rosberg, supra n. 10 at 302. They may want their children born in the United States to have the considerable benefits of dual citizenship. They may, under foreign laws, need to retain foreign citizenship in order to maintain ownership of foreign property. Many aliens, including both Appellees, for example, would immediately become citizens of the United States if they did not have to renounce foreign citizenship in order to acquire that status. Renunciation of citizenship in one's native land is an extraordinarily personal decision that may turn on many factors other than identification or lack of identification with that country's political principles. It is for that reason that renunciation of citizenship is not lightly to be presumed. See, Afroyim v. Rusk, 387 U.S. 253 (1967); Trop v. Dulles,
(FN 31 con't on next page)

however, that Appellees did not fully "identify" with democratic principles, the state would not have a permissible interest in requiring them to do so.

Whether in the form of a loyalty oath or, as here, a required declaration of intent to become a citizen, compelled political identification, particularly in the classroom, violates the First Amendment and is not a permissible state interest.[32/] And the court has recently confirmed its holding in Keyishian "that political association alone could not, consistently with the First Amendment, constitute an adequate ground for denying public employment." Elrod v. Burns, 427 U.S. 347, 358-359 (1976).

B. Education Law § 3001(3) Is Not Necessary To Promote A Compelling State Interest.

Assuming, arguendo, that New York has a

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356 U.S. 86 (1958); Terrazas v. Vance, ___ F.2d ___ (7th Cir. 1978), 46 U.S.L.W. 2651.

32/ See authorities supra, notes 22 and 23.

permissible state interest, that interest is not compelling, and Education Law § 3001 (3) is not necessary to achieve it.

1. The state legislature has disclaimed any interest in excluding alien teachers from public schools.

In sharp contrast to this Court's prior cases considering the exclusion of aliens from employment or benefits, the interest asserted in this case cannot fairly be ascribed to the legislature, or to the judiciary. Instead, it is identified and implemented solely by a single, non-elected state official.

Education Law § 3001(3) states that its citizenship or declaration of intent requirements "shall not apply" after July 1, 1967 to aliens employed pursuant to whatever regulations the Commissioner of Education, Appellant Ambach, chooses to adopt. Should Appellant decide tomorrow

to adopt a new regulation permitting aliens to teach in public schools, or in certain grade levels, or in certain subject areas, no state statute or interest would preclude him from doing so.

Under these circumstances, it is plain that the New York legislature has not mandated the exclusion of non-declarant aliens, To the contrary, although such exclusion was once required, the legislature has eliminated that requirement, and has authorized Appellant to employ non-declarant aliens if he chooses to do so. The legislature imposed no criteria or standards to limit Appellant's discretion to employ non-declarant aliens. Thus, the legislature has, in so many words, disclaimed any interest, much less a compelling interest, in excluding non-declarant aliens.

Where, as here, a rule infringes the liberty of an identifiable class of persons who, entirely apart from the rule, are already subject to disadvantages not shared by the remainder of the community, the Court has required that the decision to impose the deprivation be made at the

highest levels of government. Hampton v. Mow Sun Wong, 426 U.S. 88, 116 (1976). Compare Board of Regents v. Bakke (Opinion of Powell, J.):

> Petitioner does not purport to have made, and is in no position to make such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in Part III of this opinion, isolated segments of our vast governmental structures are not competent to make those decisions, at least in the absence of legislative mandates and legislatively determined criteria. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). (footnote omitted)

The constitutional values implicated by § 3001(3) are too important to be overridden by the unchecked judgment of a single, unelected state official.[33/]

33/ In addition, examination of the powers of the Commissioner of Education demonstrates that the reasons advanced to justify his exclusion of non-declarant aliens are not properly of his concern. Compare Hampton v. Mow Sun Wong, 426 U.S. at 116. The legislature, not the Commissioner, is given authority to legislate for the safety, health, morals, and general welfare of school children.
(FN 33 continued on next page)

2. The state legislature has authorized aliens to govern public schools.

Another provision of the Education Law authorizes aliens to vote in public school board elections and to serve as elected school board members. Education Law §§ 2590-c(3) and (4) provide that "every registered voter residing in a community district and every parent of a child attending any school under the jurisdiction of the community board of such district who is a citizen of the state ... shall be eligible to vote at such election for the members of such community board" and "shall be eligible for membership on such community board" (emphasis added). That statute has been officially construed by the New York City Board of Elections

Packer Collegiate Institute v. University of the State of New York, 273 App. Div. 203, 76 N.Y.S.2d 499 (1948), rev'd on other grounds, 298 N.Y. 184, 81 N.E.2d 80 (1948). See generally, New York State Constitution, Art. XI, § 1. Nothing in the Commissioner's grant of power, NYEL § 305, makes the inculcation of "the principles of American citizenship" subject to the Commissioner's definition or control.

and by the New York City Board of Education to require state citizenship, but not federal citizenship. A. 27-32.[34/] See, to the same effect, Coalition For Education In District One v. Board of Elections, 370 F. Supp. 42, 46 n.7 (S.D. N.Y. 1974)("such parents must be citizens of New York State, but not necessarily of the United States"), aff'd, 495 F.2d 1090, 1092 (2d Cir. 1974)("New York allows parents of students to participate in school board elections even when they are not otherwise eligible to vote in the district"). It is thus legally possible,

34/ Education Law § 2590-c was enacted in 1969, subsequent to the legislature's amendment of § 3001(3) in 1967. As noted in a letter from the Counsel to the Chancellor of the Board of Education of the City of New York, "both the Board of Education and the Board of Elections have interpreted the applicable statute (Educ. Law Section 2590-c) to provide for voting by both registered voters and by parent voters who meet the requirements of the Statute, notwithstanding that they are not United States citizens. The community school board elections which have been held to date have extended the franchise to parent voters regardless of citizenship." A 27. That these interpretations are correct is clear from the fact that the legislature, aware of those official
(FN 34 continued on next page)

and quite conceivable in many school districts in New York City, that aliens will be elected and may even compose a majority of the membership of community school boards. These boards are authorized by law (Education Law § 2590-e) to hire and fire teachers, specify curriculum, select textbooks, and "generally manage and operate the schools." It is frivolous for Appellants to contend that New York has a "compelling" interest in barring alien teachers from public schools, or that § 3001(3) is "necessary," when New York permits aliens to govern those very schools, and to make the kinds of "broad policy" decisions teachers do not make. Thus, Appellee Dachinger, who would apparently qualify as a parent voter, could serve as a member of a community school board. As such, she could participate in the hiring of teachers, but she could not

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interpretations for several years, has not amended § 2590-c to require United States citizenship.

hire Appellee Norwick.[35/]

The only state interest that would require the exclusion of alien teachers from teaching in public schools but would permit their serving as school board members is an interest in limiting the expenditure of public funds to citizens. Alien public school teachers are paid from government funds; alien school board mem-

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35/ The above-noted administrative and judicial constructions of § 2590-c recognize that at least for some purposes aliens can be citizens of New York even though they are not citizens of the United States. In fact, the only apparent requirement for New York citizenship is domicile; that is, permanent residence in the state coupled with an intent to reside in the state indefinitely. Although state citizenship does not automatically confer all political rights (minors can be state citizens but they cannot vote), there are no sub-categories of state citizenship. Thus, if Appellees (and other permanent resident aliens) are state citizens, they should be invested with the same presumption of loyalty to the state and its values as other state citizens. In its narrowest form, therefore, the question presented is whether New York has a compelling interest in requiring its own citizens to become United States citizens before they can teach in New York public schools.

bers serve without pay. Education Law § 2590-c(1). This financial distinction might also explain why aliens are permitted to teach in private schools, but not in public schools. In Graham, however, this Court rejected the old "public interest" doctrine and ruled that a state could not justify discrimination against aliens "on the basis of a State's 'special public interest' in favoring its own citizens over aliens in the distribution of limited resources." 403 U.S. at 372. See to the same effect, Sugarman, 413 U.S. at 645.

It is not mere speculation to suggest that exclusion of alien teachers from public schools is prompted in whole or large part by the state's desire to conserve limited resources for citizens. Indeed, in C.D.R. Enterprises, Ltd. v. The Board of Education, 412 F. Supp. 1164 (E.D.N.Y. 1976), summarily affirmed sub nom. Lefkowitz v. C.D.R. Enterprises, Ltd., 429 U.S. 1031 (1977), New York unsuccessfully attempted to justify, on that ground, a statute which gave an employment preference to citizens in con-

struction of public works projects. See 412 F. Supp. at 1166, 1169-1172.

3. Statutory and regulatory exceptions demonstrate that New York does not have a compelling interest in limiting public school teaching to citizens or declarant aliens.

Private school students comprise 18% of New York's total grade school and elementary school student population.[36/] It would be absurd to suggest that New York has a "compelling" interest in insuring that public school students learn the principles of democracy, but no interest in insuring that private school students learn those principles. And in fact, New York requires instruction in those principles for both public and private students. See Appellants' Brief at 8-12, and statutes cited therein. Education Law § 3001(3), however, does not

36/ Of the 3,189,781 students enrolled in grades K-12 in New York in 1977 (see Appellants' Brief at 13), 588,258 (or 18%) attended private schools where the citizenship requirement does not apply. State Department of Education, Information Center on Education, Basic Education Data System, 1977-1978 school year.

require teachers in private schools to be citizens or declarant aliens. If that requirement is not "necessary" to insure that private school students learn those principles, it is not necessary to insure that public school students learn those principles.

Similarly, under a regulation promulgated by Appellants, an alien may be allowed to teach in public schools when he or she is "unable to declare intention of becoming a citizen for valid statutory reasons." 8 N.Y.C.R.R. 80.1(i)(2). The only statutory restriction on filing a declaration of intent is the requirement that the declarant be a permanent resident alien. Thus, if identification with the principles of American citizenship is deemed a compelling necessity for public school teachers, it is hard to see why that requirement is wholly waived for persons least likely to share those values (e.g., the alien dependents of foreign diplomats and representatives to the United Nations; illegal aliens; student aliens who have overstayed their visas; etc.), and is applied to permanent resident aliens who have chosen to live

here indefinitely, and have been authorized to do so by the federal government.

Finally, New York does not exclude alien teachers from its public schools if they have "skills or competencies not readily available" among citizen teachers, 8 N.Y.C.R.R. § 80.2(i)(1), or if they are here through certain exchange programs, N.Y.E.L. § 3005. These exceptions are inconsistent with a finding that the state interest is "compelling."

4. The legislatively mandated oath requirement satisfies any permissible interest the state might have.

Many citizens do not believe in the principles of democracy and do not share the values New York wishes to inculcate. Recognizing that citizenship is not of itself a sufficient guarantee that a teacher will believe in and share those principles and values, the New York Legislature has mandated that citizens who wish to teach in public schools must take a specified oath to support the Constitution. Education Law § 3002. An identical oath is required for those non-citizens who are permitted to teach.

Education Law § 3001-a. Appellees have expressed their willingness to take that oath. A 6; A 18; A 43.

This Court has already ruled there is "no merit in the contention that only citizens can in good conscience take an oath to support the Constitution" and that states cannot presume aliens "are unable to take the oath in good faith." Griffiths, 413 U.S. at 726 n. 18. Taking the specified oath is a sufficient test of identification with democratic principles to satisfy any permissible state interest. Accordingly, no other requirement is "necessary."

5. The experience of other states shows that Education Law § 3001(3) is not necessary.

Even if every state had a citizenship requirement for teachers, that would not make such requirements constitutional. But in deciding whether such a requirement is necessary in New York, it is relevant to note that only ten other states presently have or enforce such requirements. Thus, almost four-fifths of the states do not believe such requirements are neces-

sary, and a decision in this case that such requirements are unconstitutional would have very little disruptive effect.

Most of the statutory or regulatory citizenship requirements were adopted many years ago, often during wars or periods of intense anti-foreign sentiment.[37/]

So far as Appellees are aware, no state has adopted a citizenship requirement for teachers in the last ten years. During that period, however, several states have eliminated such requirements either legislatively, administratively, or through opinions of state attorneys general.

At the present time, only one state enforces a statutory requirement of citizenship.[38/] No state, by regulation,

37/ See Schrieke and Stephenson, supra n. 3. The citizenship requirement of § 3001(3) was originally enacted in 1918. Appellants' Brief at 7.

38/ Tenn. Code Ann. § 49-1303. The information in this section is compiled from Appendix D, "Table of Statutory Restrictions on Alien Employment," in Carliner, The Rights of Aliens (Avon/Discus, 1977), as supplemented by the answers to a questionnaire sent to each state by Appellants with Appellees' permission.

requires citizenship. Not counting New York, six states, by statute, enforce a requirement of citizenship or declaration of intent to become a citizen.[39] Three states, by regulation, enforce a requirement of citizenship or declaration of intent to become a citizen.[40] The present law regarding citizenship requirements is unclear in Virginia and Georgia.[41] And in six states, the

39/ Idaho Code § 33-1202(4); Montana Revised Code § 75-6005; North Dakota Century Code 15-36-07; Washington Revised Code Annotated 28A.67.020; West Virginia Code 18A-3-1; and Texas Statutes Art. 2891(b) § 5.

40/ Mississippi Dept. of Education, "Requirements for Teacher Certification," Bulletin 130 (1975); Oklahoma Dept. of Education, "Teacher Education, Certification and Assignment Handbook (July, 1975); and Wyoming State Board of Education, Teacher Certification Regulations § 3, ch. (1).

41/ In earlier years, Virginia did not have a citizenship requirement for teachers. See Virginia State Board of Education, Certification Regulations for Teachers and Qualifications for Administrators and Supervisors, Vol. XXXIII, No. 1, July 1950, reprinted in 1955, at p. 6. But apparently some time around 1960, the State Board adopted a requirement that an applicant for a teacher's certificate
(FN 41 continued on next page)

Attorney General has ruled unconstitu-

"must be a citizen." See Virginia State Board of Education, Certification Regulations for Teachers and Qualifications for Administrative, Supervisory, and Related Instructional Positions, Vol. 46, No. 2, August 1963, p. 2. That requirement has continued to the present. See Certification Regulations for Teachers, Division of Teacher Education and Certification, Dept. of Education, Commonwealth of Virginia, January, 1978, at p. 3. But in 1973, the Attorney General of Virginia issued an opinion that "state statutes which make citizenship, or the declaration of an intent to become a citizen, a condition of licensing are unconstitutional." Report of Attorney General, 1973-1974, p. 284 (August 2, 1973). Although specifically applicable only to "statutes," the reasoning of the opinion would be equally applicable to regulations.

Furthermore, the opinion relied upon the lower court decision in Miranda v. Nelson and noted that the case involved a teacher (p. 285). Accordingly, the current regulation requiring citizenship is probably unenforceable, but Appellees have been unable to determine whether it is or is not being enforced.

In Georgia, the Attorney General has ruled that "aliens cannot be broadly excluded from all public employment." Opinion 76-74, July 12, 1976. But Appellees have been unable to determine whether the current regulatory requirement of citizenship is being enforced.

tional statutory or regulatory provisions which preclude aliens from being teachers.[42]

6. Education Law § 3001(3) does not reasonably or rationally advance any legitimate state interest.

Assuming, arguendo, that strict scrutiny is not required, the statute does not survive scrutiny under the heightened[43] rational relation test,

42/ E.g., Illinois Attorney General 1974, Opinion No. 5-747 (April 19, 1974); California, Vol. 53 Attorney General's Opinions, p. 63 at pp. 68-69 (Opinion No. 69-199, Feb. 6, 1970); New Jersey Attorney General Formal Opinion No. 10-1974 (Sept. 23, 1974)(citizenship or declaration requirement unconstitutional); Pennsylvania, 1973 Opinion No. 9 (Jan. 16, 1973)(citizenship or declaration requirement unconstitutional); Massachusetts Attorney General, letter of Oct. 29, 1974 from Walter H. Mayo, III, Assistant Attorney General, to Gregory R. Anrig, Commissioner of Education: "it is our opinion that the citizenship provisions of the teacher's certification statute are unconstitutional under the Constitution of the United States;" Michigan, Opinion No. 4925, Jan. 16, 1976. See also, Virginia and Georgia, supra n. 41. And see, notes 18 and 19, supra.

43/ E.g., Craig v. Boren, 429 U.S. 190, 198 (1976); Frontiero v. Richardson, 411 U.S. 677, 690 (1973); Stanley v. Illinois, 405 U.S. 645, 656 (1972).

or even under the minimal rational relation test.[44]

If the statute required citizenship, the Court would have to determine whether citizenship rationally advances a legitimate state interest. But the statute requires citizenship or a declaration of intent to become a citizen in the future, so the Court need only determine whether the requirement of declarant status rationally advances a legitimate state interest.

The state's interest in imparting the principles of citizenship is not reasonably advanced by a statute which permits teaching by an unmarried declarant

44/ E.g., Rosberg, supra n. 10 at 306: "How important can the state's interest be if it is prepared to separate the loyal from the disloyal by means of a technique as haphazard as classifying on the basis of alienage? The classification is seriously under- and overinclusive, and even without strict scrutiny courts might well hold that the connection between means and end is too slight to support the classification."

alien, on the first day of residence in the United States, but forbids teaching by non-declarant aliens such as Appellees who have lived here for more than a decade, are married to United States citizens, and have paid taxes to support the schools in which they would teach. Unmarried aliens who acquire permanent resident status on the day of admission to this country, and promptly file declarations of intent to become citizens, can teach for five years before they are eligible to petition for naturalization. During that time they can change their mind about becoming citizens, without any state or federal penalty. But at that time, regardless of the quality of their classroom performance, or their demonstrated identification with the principles of democracy, they must petition for naturalization or lose their certificates to teach.

The act of declaring intent to become a citizen is less formal than an oath and provides less guarantee of present identification with the principles of democracy than does the oath required of all teachers, including citizens. The

declaration is therefore superflous. The filing of a declaration does not magically invest the alien with the attributes of a citizen. That this is so can more clearly be seen by turning the point around. The state would not contend, for example, that declarant aliens should be eligible to vote, to serve on juries or to be police officers.

Even a good faith declaration is nothing more than expression of a present intent, at some point in the future, to petition for United States citizenship. It provides no real assurance that the alien is familiar with the principles of democracy, shares those principles, or will petition for and complete the process of naturalization. And the absence of a penalty for failure to complete the naturalization process means that an alien who has no real intent to become a citizen could nevertheless file a declaration and teach for at least five years, without penalty.

Thus, the declaration requirement of § 3001(3) does not reasonably or rationally advance any legitimate state interest.

C. Education Law § 3001(3) Is Inconsistent With Settled Principles of Education And Academic Freedom.

America is a nation of immigrants. That cultural diversity is the foundation of our nation's strength. But given that diversity, it is unrealistic to assume that all Americans share identical political or cultural beliefs, attitudes and values. In a pluralistic society such as ours, the principal objective of public education is to increase understanding of, and tolerance for, that diversity so that students with varied cultural heritages will learn to live together, with respect for their differences. Education Law § 3001(3), however, seeks to suppress respect for diversity and to compel standardization of ideas. Accordingly, it is inconsistent with our deep and historical commitment to an open society, and with basic educational principles.

Appellees wish to stress that they do believe in the principles of democracy and would, as teachers, impart those principles, by word and example. Furthermore, even if some alien teachers did

have different perspectives or attitudes which varied somewhat from Appellants' hypothetical but unrealistic citizen-norm, those differences would inform and enhance the educational experience of their students.

Preliminarily, it does not denigrate the overall importance of the teacher to suggest that the teacher's role in "political socialization" is not nearly so great, or so clear, as Appellants contend. Although teachers' attitudes are no doubt to some extent transmitted to students, the principal study relied upon by Appellants acknowledges that "evidence on the amount of such attitude transmission is neither readily available nor precise."45/

45/ Hess & Torney, The Development of Political Attitudes In Children (1967), at p. 111 (cited in Appellants' Brief at 21, 22, 23, 24 and 25). Furthermore, as Hess and Torney point out, "it seems likely that much of what is called citizenship training in the public schools does not teach the child about the city, state, or national government, but is an attempt to teach regard for the rules and standards of conduct of the school." Id. at p. 218.

Many non-school factors, including family, religion and individual intelligence and experience, contribute to political socialization. Furthermore, later studies, not cited by Appellants, conclude that even within the school, the teacher's contribution to political socialization is unclear.[46/]

The American classroom has properly been described as "the market place of ideas." Keyishian, 385 U.S. at 603. Standardization of teachers or ideas is inconsistent with that basic principle of academic freedom. Thus, in Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925), this Court rejected a state attempt to use public schools to "standardize" students.[47/] And in Meyer v. Nebraska, 262 U.S. 390, 401 (1923), this Court invalidated a Nebraska

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46/ Eg., Jennings and Niemi, The Political Character of Adolescence: The Influence of Families and Schools (1974), at p. 182: "It is apparant that curriculum, teachers, school climate, and peer groups all may contribute to the political socialization process; but the relative contribution of each is unclear." "Our findings certainly do not support the thinking of those who look to the civics curriculum in American high schools as a major source of political socialization." Id. at p. 205.

47/ "The fundamental theory of liberty upon (FN 47 continued on next page)

statute which prohibited the teaching of foreign languages in public (and private) schools. The state interest asserted in Meyer was almost identical to the interest asserted here:

> the purpose of the legislation was to promote civil development by inhibiting training and education of the immature in foreign tongues and ideals....(emphasis added).

The Court spurned Nebraska's contention that allowing foreign-born students to be taught in their native language would inculcate in them ideas and sentiments foreign to the best interests of this country.[48/] The Court has

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which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State...."

48/ Although Meyer was decided before the express incorporation of First Amendment rights into the Fourteenth Amendment, it has since been read by this Court as a First Amendment case. Epperson v. Arkansas, 393 U.S. 97 (1968). Appellees, of course, do not intend to teach foreign "ideals." Their submission, to the contrary, is that they are prepared to communicate precisely what the state can legitimately require of teachers. Indeed, with the benefit of a comparative view, and more than a (FN 48 continued on next page)

ruled, citing Meyer, that a state may not conduct its schools deliberately to "foster a homogenous people." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969). The Court's strong support for academic freedom and careful restriction of loyalty oaths for teachers[49/] reflect the First Amendment's intolerance for laws "that cast a pall of orthodoxy over the classroom." Keyishian, 385 U.S. at 603.

Indeed, it would seem to follow a fortiorari from Keyishian, supra, West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), and their progeny, that if a state cannot prevent citizens who are acknowledged communists from teaching, and cannot require pupils or citizen teachers to participate in or lead the pledge of allegiance to the flag,[50/] it cannot

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decade of residence in the United States with American spouses, it is likely that Appellees could communicate the spirit and substance of American values as well as, if not better than, native born teachers, many of whom take our institutions for granted.

49/ See authorities cited supra notes 22 and 23.

50/ Eg., Russo v. Central School District

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exclude from the classroom non-communists who are willing to take an oath of allegiance, simply because they are not citizens or declarant aliens.

Furthermore, in a diverse, pluralistic society, " 'the robust exchange of ideas'... is of paramount importance in the fulfillment of [the educational] mission." Regents of the University of California v. Bakke, 57 L.Ed.2d at 786 (1978) (Powell, J.). In Bakke, Mr. Justice Powell discussed at length the educational and constitutional importance of "a diverse student body." Bakke, 57 L.Ed.2d at 785-786:

> The atmosphere of "speculation, experiment and creation" - so essential to the quality of higher education - is widely believed to be promoted by a diverse student body. As the Court noted in Keyishian, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as

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No. 1, 469 F.2d 623 (2d Cir. 1972), cert. denied, 411 U.S. 932 (1973); Hanover v. Northrup, 325 F. Supp. 170 (D.Conn. 1970); State v. Lundquist, 262 Md. 534, 278 A.2d 263 (1971); Opinions of the Justices to the Governor, 363 N.E. 2d. 251 (Mass., 1977). See also, James v. Board of Education of Central District No. 1, 461 F.2d 566 (2d

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this Nation of many peoples.

> Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission. (footnote omitted)51/

The same educational and constitutional principles that call for diversity among students call for diversity among teachers.

There are other societal benefits to be gained from permitting aliens to teach. Just as a Black teacher serves as a positive role model for a Black student, an alien teacher serves as a positive role model

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Cir. 1972)(teacher cannot be fired for expressing opposition to our national policy regarding Vietnam by wearing black armband).

51/ In the omitted footnote, the President of Princeton University "described some of the benefits derived from a diverse student body" including "interactions among students ...from various states and countries...." Bakke, 57 L.Ed.2d at 785, n. 48.

for an alien student -- tangible evidence to the student that aliens can play a useful and productive role in American society.52/

D. Education Law § 3001(3) Is Not Narrowly or Precisely Drawn.

This is the ground on which the three-judge court found the statute to be unconstitutional. A 44-47.53/

1. The statute is underinclusive.

If the state really wants to prevent persons who have not renounced a foreign citizenship from teaching New York students, the statute does not accomplish that goal. It does not prevent such persons from teaching in private schools. And it does not prevent such persons, if they hold dual citizenship, from teaching in public

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52/ Although precise figures are not available, it is clear that large numbers of alien students attend New York public schools, particularly in New York City. See generally, A 27-28.

53/ See generally, Rosberg, supra n. 10, at 315: "As a test of affinity, an alienage classification is seriously over - and underinclusive."

schools.[54]/

2. The statute is overinclusive.

The statute prohibits an alien from any country from teaching any subject at any grade level.

Country. Assuming, arguendo, that the state has an interest in requiring aliens who come from countries with political systems and values quite different from our own to renounce those values, this statute sweeps much more broadly than that, and requires renunciation of political and cultural values almost indistinguishable from our own. Appellee Norwick, for example, is a citizen of Great Britain, a country whose political and cultural values are much like our own. In fact, so close are those values that renunciation of Great Britain's values would be inconsistent with acceptance of our own.

Recognizing that not all countries are alike, the federal government has drawn

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54/ Persons born in the United States of alien parents may be dual citizens. 8 U.S. C. § 1482. They do not have to renounce citizenship in the other country in order to teach in New York schools.

geographical distinctions, even for highly sensitive positions. For example, although the Public Works Appropriation Act of 1971[55]/generally provides that employees of the Atomic Energy Commission and similar sensitive agencies must be citizens or declarant aliens, the Act expressly exempts aliens from designated countries.[56]/

Subjects. As the three-judge court noted, although this statute prevents a Russian citizen from teaching civics, it also prevents a French citizen from teaching French, a British citizen from teaching math, and a Canadian citizen from teaching metal working or gym. A 45.

55/ Public Works for Water, Pollution Control, and Power Development and Atomic Energy Commission Appropriation Act, 1971, Pub. L. No. 91-439; 84 Stat. 890 (1971).

56/ The act exempts "an alien from Poland or the Baltic countries lawfully admitted to the United States for permanent residence," and exempts "citizens of the Republic of the Phillippines," and "nationals of those countries allied with the United States in the current defense effort...." Pub. L. No. 91-439, § 502. (1970 U.S. Code, Cong. & Ad. News 1040, 1051). This distinction was noted by the three-judge court during oral argument. See Transcript of argument on February 11, 1976, p. 21.

Grade Level. This statute prevents the employment of a non-declarant alien at any grade level from kindergarten through college. Although Appellants apparently do not qualify or certify teachers for public colleges (Appellants' Brief, p. 13 n. *), that is irrelevant. "Certification" of teachers is only one of the three basic requirements of § 3001 (age; certification; and citizenship.) Thus, even if Appellants do not certify public college teachers under § 3001(2), the citizenship requirement of § 3001(3) nevertheless requires public college teachers to be citizens. The immediate predecessor of § 3001(3), identical in this respect, has been so construed by the New York courts, and that construction has not been changed by the legislature. For example, because he was not a citizen, Bertrand Russell was prohibited from teaching in a New York public college.[57/]

57/ Kay v. Board of Higher Education, 173 Misc. 2d 943, 18 N.Y.S. 2d 821 (Sup. Ct. N.Y. Co.); aff'd 259 App.Div. 879, 20 N.Y.S. 2d 1016; leave app. den., 259 App. Div.1000, 21 N.Y.S. 2d 396 (1st Dep't); leave app. den., 284 N.Y. 578 (1940).

Furthermore, the statutory sections immediately following § 3001 show, on their face, that the legislature intended this statutory scheme to apply to college teachers. Sections 3001-a and 3002, for example, specify the oath that must be taken by citizens and by those aliens who are permitted to teach, and they expressly require designation of the "school, college, university or institution" to which the teacher will be assigned.

Even within the pre-college grades (K-12), the state's interest in political socialization of students drops sharply, and becomes "at best" "speculative" after the eighth grade.[58/] The state's

58/ In Wisconsin v. Yoder, 406 U.S. 205, 226-227 (1972), for example, the court noted that the "requirement for compulsory education beyond the eighth grade is a relatively recent development in our history" and that "there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education [after eighth grade]." See, to the same effect, Hess & Torney, supra n. 45 at p. 114: "...from these data it may be argued that many of the basic orientations are established in the pre-high school years."; Jennings & Niemi, supra n. 46 at p. 183; Easton & Hess, "The Child's Political World," 6 Midwest J. of Political Science

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interest in political socialization of children age 16 or over, usually grade 10, is so slight that full time compulsory education is ordinarily not required at all. New York Education Law § 3205(1).

But this statute, under the asserted justification of political socialization, prohibits non-declarant aliens from teaching even students aged 17-21, in grades 11 or 12, and students of any age in college, where attendance is not required.

Finally, in deciding whether § 3001 (3) is narrowly drawn it is relevant to note, as did the court below, "that Section 3001(3) is but one aspect of a rather comprehensive statutory scheme, embodied in the Education Law, prohibiting the alien from participating in a broad range of employments," including chiropractor, veterinarian and masseur. A 53 n. 14. Indeed, given the sweep of anti-alien laws New York has defended,

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229, 236 (1962); and Greenstein, "Political Socialization," 14 International Encyclopedia of the Social Sciences 551, 554 (1968).

which this and lower courts have found unconstitutional,[59/] any claim that § 3001(3) is precisely tailored should itself be subjected to close scrutiny.

59/ E.g., Graham v. Richardson, 403 U.S. 365 (1971)(welfare benefits); Sugarman v. Dougall, 413 U.S. 634 (1973)(competitive civil service); Nyquist v. Mauclet, 432 U.S. 1 (1977)(financial assistance for higher education); Lefkowitz v. C.D.R. Enterprises, Ltd., 429 U.S. 1031 (1977) (employment on public works projects); Surmeli v. New York, 412 F. Supp. 394 (SDNY 1976), aff'd, 556 F.2d 560 (2d Cir. 1976), cert. denied, 56 L.Ed.2d 400 (1978)(physician); Kulkarni v. Nyquist, 446 F. Supp. 1269 (NDNY, 1977), appeal dismissed, F.2d (2d Cir. No. 77-8015, March 9, 1977)(professional engineer and physical therapist); Sundram v. Niagara Falls, 7 Misc. 2d 1002, 357 N.Y.S. 2d 943 (1973), aff'd, mem., 44 App. Div. 2d 906, 356 N.Y.S. 2d 1023 (4th Dept. 1974) (taxi driver).

III. EDUCATION LAW § 3001 (3) IS VOID UNDER THE SUPREMACY CLAUSE BECAUSE IT IS INCONSISTENT WITH GENERAL FEDERAL LAWS REGARDING THE IMMIGRATION, RESIDENCE AND EMPLOYMENT OF ALIENS, AND WITH SPECIFIC FEDERAL LAWS REGARDING THE IMMIGRATION, RESIDENCE AND EMPLOYMENT OF ALIEN TEACHERS.

A. The Statute Is Inconsistent With General Federal Laws Regarding the Immigration, Residence and Employment of Aliens.

The power to regulate the immigration and naturalization of aliens is exclusively a federal power committed to the political branches of the federal government. De Canas v. Bica, 424 U.S. 351, 354 (1976); Examining Board v. Flores de Otero, 426 U.S. at 602. Mathews v. Diaz, 426 U.S. at 81; U.S. Const. Art. 1, § 8, cl. 4. A state statute which conflicts with the federal program for the regulation of resident aliens is void under the Supremacy Clause, Article VI, because it constitutes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67-68 (1941); De Canas v. Bica, 424 U.S. at 363.

The states

> "can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration..." Takahashi v. Fish & Game Comm'n, supra 334 U.S. at 419.

Accord, De Canas v. Bica, 424 U.S. at 358 n.6. A state statute which imposes "auxiliary burdens upon the entrance or residence of aliens...discourage(s) entry into or continued residency in the State," Graham v. Richardson, 403 U.S. at 378-379, and conflicts with the supreme federal power in the immigration area.

Congress has enacted a comprehensive plan for the regulation of aliens residing in the United States, and has broadly guaranteed aliens "the same right in every State and Territory...to the full and equal benefit of all laws and procedures for the security of persons and property

as is enjoyed by white citizens." 42 U.S.C. § 1981. As a consequence of this statutory declaration "aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under non-discriminatory laws.'" Graham v. Richardson, 403 U.S. at 377, 378, quoting from Takahashi v. Fish & Game Comm'n, 334 U.S. at 420.

On the basis of this congressionally declared policy of equality of legal privilege, the Court has struck down state statutes which discriminated against aliens in the enjoyment of public resources, the receipt of public benefits and the opportunity to work. See Takahashi; Graham; C.D.R. Enterprises Ltd. v. Board of Education, 412 F. Supp. 1164, 1171-1172 (E.D.N.Y. 1976), summarily aff'd, 429 U.S. 1031 (1977); and Examining Board v. Flores de Otero, 426 U.S. 572 (1976).[60/]

60/ See also, Mohamed v. Parks, 352 F. Supp. 518, 521 (D. Mass. 1973); Sugarman v. Dougall, 339 F. Supp. 906, 910-911 (S.D.N.Y. 1971)(three-judge court); Younus v. Shabat, 336 F. Supp. 1137, 1139-1140 (N.D. Ill. 1971)(on both equal pro-

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The same result is required here. Congress has carefully established a scheme for the admission and naturalization of immigrants and has clearly decided not to condition the employment of aliens on naturalization. The Congressional plan explicitly contemplates, and sanctions, sizeable groups of permanent resident aliens (approximately 4 million at the present time), economically paying their way by engaging in their chosen occupations and professions. Section 3001 (3) imposes serious, additional burdens and restrictions on such aliens by requiring that they become citizens as a precondition to engaging in their professions. The state is forbidden to impose such burdens. Graham, 403 U.S. at 377-379. Takahashi, supra; Hines v.

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tection and Supremacy Clause grounds), aff'd in an unpublished opinion of the 7th Cir. Court of Appeals, No. 72-1051, Jan. 3, 1973; Purdy & Fitzpatrick v. California, 71 Cal. 2d 556, 79 Cal. Rptr. 77, 456 P.2d 645 (1969). This Court did not need to resolve the Supremacy Clause challenges in Mauclet and Sugarman, supra.

Davidowitz, supra.

The burden imposed is especially inconsistent with the federal interest that aliens be gainfully employed, because of the number of jobs affected. Teaching is the third largest occupational category in New York, and is apparently the largest category of public employment (see n. 26 supra). Moreover, educated aliens are particularly suited to teaching subjects that know no geographic boundaries, such as science and mathematics, and are uniquely suited to teaching the language, history and customs of their native lands. By comparison, the Court struck down as violative of federal immigration policy an Arizona law that permitted aliens to work as laborers, but limited the proportion of aliens employed by every employer of more than five workers to less than 20%. Truax v. Raich, 239 U.S. 33 (1915).

Section 3001(3) thus constitutes a burden on employment, an area crucial to the alien's development and survival. Most states do not impose such a burden on alien teachers (see Point II.B.5, supra). Accordingly, Section 3001(3) discourages entrance and residence in

New York State and therefore conflicts with the federal grant of resident alien status to Appellees, and with the federal policy expressed in 42 U.S.C. § 1981 of "equality of privileges" under state laws for all resident aliens. Graham, supra.

New York's asserted concern for the resident alien's lack of allegiance and its contention that it may disfavor those residents of the state who "choose to continue their allegiance to another nation" (A 34), demonstrates the extent to which § 3001(3) is inconsistent with federal law. A state law which distinguishes on the basis of loyalty to the United States between citizens and non-declarant aliens is inconsistent with federal law regulating the entrance and residence of aliens. Se Younus v. Shabat, 336 F. Supp. at 1140.[61]

61/ Although the alien-appellees in Graham were eligible for citizenship (one having resided here since 1956), neither the appellants nor the unanimous court suggested that the Arizona law could be justified by the purpose of inducing aliens to become citizens. Such a purpose, for a state, is not permissible. Hines v. Davidowitz, supra; Mauclet, 432 U.S. at 10.

The Immigration and Nationality Act already makes suitable provision for excluding persons of questionable loyalty to the United States. The provisions of 8 U.S.C. §§ 1182(a)(27), (28), (29), coupled with the questioning of entrants into this country by federal authorities,[62/] indicate that the federal government carefully considers questions such as political allegiance, and whether the alien intends to become a citizen, in deciding whether to grant admission. The term "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an

62/ All aliens arriving at ports of the United States are subject to examination by immigration officers. The Attorney General and any immigration officer has the power to question entrants to the United States. "Any person coming into the United States may be required to state under oath the purpose or purposes for which he comes, the length of time he intends to remain in the United States permanently and, if an alien, whether he intends to become a citizen...." 8 U.S.C. § 1225(a)(emphasis supplied).

immigrant in accordance with the immigration laws...." 8 U.S.C. § 1101(20). Compare 8 U.S.C. § 1101(15)(F).

Because the federal government allows selected individuals to reside in this country as permanent resident aliens, without requiring them to declare their intention to become citizens as a condition of admission or of continued residence, there is a clear federal policy that such aliens may live in each state on an equality of privileges with other state citizens without having to renounce their foreign citizenship or to declare their intent to become citizens. A state statute which directly conditions employment on factors the federal government has already considered and rejected in allowing aliens entrance into the country is a "state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country" and impermissibly imposes "additional burdens not contemplated by Congress." De Canas v. Bica, 424 U.S. at 358 n. 6.

Congress is aware that aliens cannot live where they cannot work unless they are supported by a spouse or by govern-

mental benefits. Accordingly, aliens seeking permanent residence who are not at that time married to or immediate relatives of United States citizens or other permanent resident aliens must generally show they have employment skills that are needed in this country, and that their intended employment will not adversely affect wages and working conditions in the United States. See generally, 8 U.S.C. § 1182(a)(14); 8 U.S.C. § 1153(a)(3) and (6). This usually requires a "labor certification" by the Department of Labor. See generally, 20 C.F.R. § 656. Issuance of the certification requires, for many aliens, proof of a bona fide job offer on Form MA 7-50B. 8 C.F.R. § 204.1(c).

In fact, Congress has even required, in some circumstances, that aliens applying for admission as professionals meet Congressionally specified tests of competence. For example, 8 U.S.C. § 1182(a)(32) provides that certain aliens who seek admission to practice medicine must "have passed parts I and II of the National Board of Medical Examiners Examination... [and must be] competent in oral and written English."

Thus, individual aliens are granted permanent resident status on the basis of a careful federal determination that they are sufficiently loyal to the United States, even though they do not intend to become citizens; that they have employment skills that are needed in the United States; and that their employment will not adversely affect wages and working conditions. Section 3001(3) is inconsistent with those federal determinations of loyalty and employability, and is therefore void.

B. The Statute Is Inconsistent With Specific Federal Laws Regarding The Immigration, Residence And Employment Of Alien Teachers.

1. Alien teachers admitted for permanent residence.

Congress has established standards or "preferences" for determining who, among the thousands of aliens seeking permanent residence in this country, shall be granted that status. See generally, 8 U.S.C. § 1153. One of those preferences is for "members of the professions." 8 U.S.C.

§ 1153(a)(3). The "term 'profession' shall include...teachers in elementary or secondary schools, colleges, academies, or seminaries." 8 U.S.C. § 1101(a)(32). But the admission of even "preference" aliens requires a detailed federal determination of their employability.

Prior to amendments in 1976, aliens who applied for permanent resident status in order to teach were denied admission unless the Secretary of Labor had determined there were not sufficient teachers who were able, willing, available and "qualified." 8 U.S.C. § 1182(a)(14). Thus, if there was one opening for a teacher, and one teacher already here met the minimum qualifications for the position, the alien teacher would be excluded, even if the alien's qualifications were superior. In 1976, however, that section was amended to read: "able, willing, qualified (or equally qualified in the case of aliens who are members of the teaching profession...)." That parenthetical addition means that alien teachers with superior qualifications will not be denied permanent resident status

just because a teacher already here has the requisite minimal qualifications.

In short, Congress has legislated with extreme precision regarding the admissibility of alien teachers. Since 1976, aliens admitted for the purpose of teaching have been admitted on the basis of a federal determination that they are better qualified to teach than any willing and available teacher already present. Thus § 3001(3) is in direct conflict with federal law regarding the admission and employment of alien teachers. And if allowed to stand, § 3001(3) might subject public school students to instruction by teachers who have been found by the federal government to be less qualified than the alien teachers.

2. Alien teachers admitted for temporary residence or as part of Congressionally authorized teacher exchange programs.

Drawing on the exclusive federal power over the field of foreign relations, Congress has comprehensively authorized and encouraged the international exchange of teachers. The Mutual Cultural and

Education Act of 1961 (Fulbright-Hays Act), P.L. 87-256, as amended, 22 U.S.C. §§2451-52, is specifically designed to encourage the employment of alien teachers in this country.[63] The International Education Act of 1966, 20 U.S.C. § 1173, authorizes the Secretary of Health, Education, and Welfare to support a variety of teacher exchange programs, including programs under which aliens may work and study here concurrently, 20 U.S.C. § 1173(a)(5), and may visit American institutions as faculty, 20 U.S.C. § 1173(a)(6). The Education Amendments of 1976, Pub. Law 94-482, 20 U.S.C. § 512a authorizes federal grants "to stimulate locally designed educational programs to increase the understanding of students in the United States about the cultures and actions of other nations in order to

63/ Pursuant to that act, in 1973-1974 the federal government expended $738,538 in grants to 320 teachers from 44 countries to enable them to teach in the United States. Library of Congress Congressional Research Source, "Authority, Operation and Administration of the Fulbright-Hays Program of International Educational Exchange" (May 5, 1976).

better evaluate the international and domestic impact of major national policies." And the Peace Corps has proceeded on the explicit Congressional finding that the free exchange of teachers furthers our foreign policy interests by advancing mutual understanding.[64]

In addition, the United States has entered into a series of bilateral treaties and conventions designed to encourage the exchange of teachers by minimizing taxation on the income of alien teachers. See generally, Historical Note, Treaties and Conventions, following 26 U.S.C.A. § 871, and treaties and conventions listed therein. See also CCH, Income Tax Treaties 57-120-57. The United States is a party to treaties encouraging international teacher exchange with both the United Kingdom and Finland, Appellees' countries of citizenship. These treaties indicate the comprehensive interest

64/ Knowledge and skill projects, involving various forms of education, comprise 31% of Peace Corps activities, and since its inception have represented its most common effort. Project Record System, Peace Corps Office of Management (May 31, 1978).

Congress has taken in this area, an interest which precludes inconsistent state involvement. Implicit in a Congressional promise to give tax benefits to alien teachers is a Congressional promise that aliens can find employment as teachers, and a Congressional finding that alien teachers will not corrupt the nation's youth.

These statutes and programs reflect a comprehensive determination by Congress that the widespread exchange of teachers is in the interests of our foreign policy.65/ They also embody a Congressional

65/ The purpose of the Fulbright-Hays Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange, to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments and achievements of the people of the United States and other nations, and the contributions being made toward a peaceful and more fruitful life for people throughout the world; to promote international cooperation for educational and cultural advancement; and thus to assist in the development of friendly, sympathetic, and peaceful relations between the United States and the other
(FN 65 continued on next page)

determination that the extensive exchange of teachers would contribute to the education of American students and to healthy and robust debate on a wide range of issues it is the function of the First Amendment to protect.66/ Congress has power to promote or even require such education exchanges pursuant to its commerce powers, foreign affairs powers, and

countries of the world." 22 U.S.C.A. § 2451. The preamble to the International Education Act of 1966 provides: "Congress hereby finds and declares that a knowledge of other countries is of the utmost importance in promoting mutual understanding and cooperation between nations; that strong American education resources are a necessary base for strengthening our relations with other countries;... and that it is therfore both necessary and appropriate for the Federal Government to assist in the development of resources for international study and research." 20 U.S.C.A. § 1171.

66/ For example, Congress declared in the International Education Act, its purpose "that this and future generations of Americans should be assured ample opportunity to develop to the fullest extent possible their intellectual capacities in all areas of knowledge pertaining to other countries, people, and cultures." 20 U.S.C. § 1171.

powers to enforce the First and Fourteenth Amendments.[67/]

Federal programs supporting the placement of alien teachers in local schools throughout the nation represent an extraordinary statement of the importance Congress attaches to the relaxation of barriers erected by local interests again the free exchange of educational resources.[68/] The breadth of Congressional concern, and the evident importance Congress has placed on such exchanges, compels the conclusion that although Congress has left to the states general responsibility over teacher certification and employment, the states may not deny

67/ The sources of Congressional power affirmatively to support the system of free expression are analyzed in Emerson, The System of Freedom of Expression (1970), at 627-633, 671-673.

68/ Education Law § 3005 permits non-declarant aliens to teach in public schools in New York, but only as part of a one-for-one exchange, and only under conditions (the domestic teacher must have taught for five years in the designated school, etc.) which discourage the free exchange of educational resources.

such employment solely on the basis of alienage. "[T]he nature of the...subject matter permits no other conclusion." De Canas v. Bica, 424 U.S. at 356, quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963). Congress having determined that the national interest is served by the employment of otherwise qualified alien teachers, the exclusion of aliens per se is in clear conflict with the "central aim of federal regulation." San Diego Unions v. Garmon, 359 U.S. 236, 244 (1959), cited in De Canas v. Bica, 424 U.S. at 359.

Finally, even if the Congressional treaties, conventions, programs, and statements of purpose left some room for state legislation, § 3001(3) is nevertheless unconstitutional because it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." De Canas v. Bica, 424 U.S. at 363; Hines v. Davidowitz, 312 U.S. at 67; Florida Lime & Avocado Growers v. Paul, 373 U.S. at 141. The Congressional presence plainly leaves to state regulation only the smallest possible scope consistent with compelling state objectives.

Those objectives can be met far more precisely than by the present blunderbuss exclusion of alien teachers, despite their personal qualifications, from all schools, at all grade levels, in all subjects. See generally, supra, Point II.D.

IV. EDUCATION LAW § 3001(3) VIOLATES THE DUE PROCESS CLAUSE.

The statute violates the due process clause of the Fourteenth Amendment because it creates an irrebuttable presumption that all non-declarant aliens are not qualified to be teachers, and because it authorizes exceptions to be granted or withheld within the standardless discretion of Appellants.

A. The Statute Impermissibly Creates An Irrebuttable Presumption.

When, as here, constitutionally preferred rights are at stake, this Court has required an individualized determination before the right can be abridged, and has ruled invalid statutory presumptions which preclude the opportunity for individual-

ized determination.[69] This rule against irrebuttable presumptions applies to protect aliens, a suspect class, even when they are not seeking to exercise a fundamental right. See Elkins v. Moreno, ___ U.S. ___, 55 L. Ed. 2d 614 (1978).

Although many aliens, including Appellee Norwick, have taught with distinction and with allegiance to the principles of democracy in New York private schools, and would be superbly qualified teachers in the public schools (see Statement of Facts, and Point III.B.1. supra), they have been denied the opportunity to prove their qualifications and allegiance. In their answer, Appellants "admit that they have not made an individual determination of [Appellees'] competence to teach" except that required by existing law. A 12-13.

The effect of the challenged provision is to create a conclusive and irrebuttable presumption that non-declarant aliens are not qualified to be teachers.

69/ E.g., Vlandis v. Kline, 412 U.S. 441 (1973); Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972).

They are presumed to lack the necessary allegiance to this country (A 34):

> [A]liens who voluntarily refuse naturalization and thereby choose to continue their allegiance to another nation...are not appropriate teachers....

To thus raise the factual issue of allegiance, but to deny permanent resident aliens the opportunity to prove their allegiance, violates the due process clause.

In Vlandis v. Kline, 412 U.S. 441 (1973), this Court held invalid a statutory definition of "resident" which denied to persons seeking to meet its test the opportunity to show factors clearly bearing on the issue. 412 U.S. at 452. The Court reaffirmed the Vlandis rule in Weinberger v. Salfi, 422 U.S. 749, 772 (1975), insofar as a presumption would deny to Appellees the right to prove a fact which the state has put at issue.70/

70/ Distinguishing the statutory scheme before it from the law overturned in Vlandis, the Weinberger Court said: "Unlike the statutory scheme in Vlandis, the Social Security Act does not purport to speak in terms of the bona fides of the parties to a marriage, but then make plainly relevant evidence of such bona
(FN 70 continued on next page)

More recently, in Elkins, the Court noted the invalidity of a statute which "purports to be concerned with" a factual issue, but then "denied to one seeking to meet" the statutory test "the opportunity to show factors clearly bearing on that issue." 55 L. Ed. 2d at 625, quoting from Weinberger.

B. The Statutory And Regulatory Scheme Authorize Exceptions Within The Standardless Discretion of Appellants.

If he chooses to do so, Appellant Ambach can authorize any alien to teach. There are no legislative standards to limit his discretion, and the regulatory standards issued by his office are so broad as to

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fides inadmissable." Weinberger v. Salfi, 422 U.S. at 772.

Here, of course, the state has purported to speak in terms of allegiance, e.g., A 34, but forbids Appellees from proving they have such allegiance. Appellees would also prevail under the more difficult rationality standard set forth in Weinberger because the objective criterion here (citizenship or declaration), as has been demonstrated, supra, does not "bear a sufficiently close nexus with the underlying policy objectives" (allegiance), to justify its use as a test for eligibility. Id.

permit unchecked discretion.[71]

"Precision of regulation must be the touchstone" when First Amendment or other fundamental rights are at stake. Keyishian, 385 U.S. at 603-604, quoting NAACP v. Button, 371 U.S. 415 (1965); U.S. v. Robel, 389 U.S. 258, 274-275 (1967) (Brennan, J., concurring). The Court has repeatedly struck down schemes in which state officials had unchecked discretion to decide whose views were acceptable and entitled to be heard. E.g., Niemotko v. Maryland, 340 U.S. 268, 271-272 (1951); Cox v. Louisiana, 379 U.S. 536, 557-558 (1965); South Eastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975); Kunz v. New York, 340 U.S. 290, 294 (1951). Such arrangements are overbroad because they permit officials to achieve indirectly, through selective enforcement, censorship that would clearly be unconstitutional if achieved directly. The liklihood of

71/ The absence of legislative standards impermissibly allows an "isolated segment" of government to subject a disadvantaged class to arbitrary and additional disadvantages. See note 32 supra and accompanying text.

selective enforcement is particularly apparent where, as here, the state asserts as its very interest a test of political acceptability.

Appellants "may" issue certificates to aliens unable to become declarants (i.e., any alien who is not a permanent resident), 8 N.Y.C.R.R. 80.2(i)(2), or possessing skills or competencies not readily available, 8 N.Y.C.R.R. 80.2(i)(1).[72] There are no standards to guide the exercise of their discretion. Such license, in a field so directly affecting a suspect class, academic freedom, and the right to work in the common occupations of the community, is not constitutionally permissible.

72/ As noted supra Point III.B.1., since 1976, the federal government has determined that aliens admitted for the purpose of teaching have skills or competencies superior to those of available teachers already present. If applied consistenly with that federal determination, § 80.2(i)(1) would authorize the employment of permanent resident alien teachers. Instead, Appellants inform us that it is not applied at all. Appellants' Brief at 7 and 28.

V. REMAND FOR AN EVIDENTIARY HEARING IS NOT REQUIRED.

Appellants have stipulated that in all respects except alienage, Appellees are qualified to teach in public schools. A 25; A 35. At the oral argument on Appellees' motion for summary judgment, counsel for Appellants expressly stated she was not aware of any fact that would prevent disposing of the case on summary judgment, did not dispute the material facts specificied by Appellees pursuant to a local court rule, and thought summary judgment was appropriate, though for Appellants, not for Appellees.[73/] Almost ten weeks thereafter, Appellants filed an offer of proof. A 33-34. The Court did not reject the offer of proof. Compare, Appellants' Brief at 32. Instead, the court accepted the offer of proof but found as a matter of law that it was insufficient, even if believed, to preclude summary judgment for Appellees. A 47-48.

Accordingly, a remand for an evidentiary hearing is not necessary. However, should the Court conclude that § 3001(3) is not on its face unconstitutional as a matter of law, Appellees would respectfully request an opportunity for an evidentiary hearing to demonstrate that the statute is, as applied to them, unconstitutional.

73/ Transcript of oral argument on February 11, 1976, pp. 29-30.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED

Dated: New York, New York
September 5, 1978

Respectfully submitted,

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA as Director of the Division of Teacher Education and Certification of the Education Department of the State of New York, and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York, *Appellants,*

against

SUSAN M. W. NORWICK, *Appellee,*

TARJA U. K. DACHINGER, *Intervenor-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

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IN THE

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OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA as Director of the Division of Teacher Education and Certification of the Education Department of the State of New York, and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York, *Appellants,*

against

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

A. New York Education Law § 3001(3) and related provisions qualify teachers for elementary and secondary public schools. Immigrant aliens who have the capacity to apply for citizenship but do not are denied permanent certificates by statute. Related provisions authorize temporary certificates for aliens admitted for temporary residence and for temporary instructional needs including exchange teaching.

Education Law §§ 3001(3), 3001-a, 3005 and 8 NYCRR § 80.2(i) qualify elementary and secondary public school teachers, not professors at New York's publicly assisted colleges and universities as appellees contend. Brief for Appellees ("Appellees' Brief"), pp. 74-75. See Brief for Appellants ("Appellants' Main Brief") p. 13, first footnote. The opening phrase of Education Law § 3001 expressly limits the section to teachers in "public schools." This limitation necessarily applies to all three subdivisions of § 3001, age (subd. 1), certification (subd. 2) and "citizenship" (subd. 3), not merely to the certification subdivision as appellees state. Appellees' Brief, p. 74. Education Law § 3001-a (temporary certification for first preference aliens under quota disabilities) and § 3005 (temporary certification for foreign exchange teachers) are also expressly limited to "public school" teachers. Part 80 of Title 8, NYCRR which includes § 80.2(i), is concerned exclusively with elementary and secondary teaching certificates for public schools. See esp. 8 NYCRR § 80.1(6), (10), (11), (12), (18), (25), (27), (32), (36), (37); § 80.15; § 80.16.

A public school is an "elementary or secondary school . . . usually free, maintained by . . . [a] local governmental authority." WEBSTER'S NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE, p. 2005 (2d ed. unabr. 1949). See also 10 N.Y. State Rep. 449, 451-52 (1916), the "system of free common schools" mandated by the State Constitution (now Art. 11, § 1) consists of elementary and secondary schools. Education Law § 3002 demonstrates that the Legislature intended only the dictionary, or ordinary, meaning of "public school" in §§ 3001, 3001-a and 3005. Section 3002 requires an oath to teach in both public schools and publicly assisted colleges and universities. Unlike the operative language in Education Law §§ 3001, 3001-a and 3005 which is limited to "public school" teachers, § 3002 adopts the terms "teacher" in the "public school

system" and "professor" at "college" or "university" to meet its broader purposes.*

Dicta in *Kay* v. *Board of Higher Education,* 173 Misc. 2d 943, 18 N.Y.S.2d 821 (Sup. Ct. N.Y. Co.), *aff'd* 259 App. Div. 879, 20 N.Y.S. 2d 1016, *leave app. den.,* 259 App. Div. 1000, 21 N.Y.S. 2d 396 (First Dep't), *leave app. den.,* 284 N.Y. 578 (1940), which would apply Education Law § 550 (3) [now § 3001(3)] to college professors is erroneous. Appellants' Main Brief, p. 13. Compare Appellees' Brief, p. 74 and n. 57. Therein, the state Supreme Court enjoined Bertrand Russell's appointment to City College on the ground that he was morally unfit. 18 N.Y.S. 2d, *supra,* at 826-31.** Although the court expressly disclaims reliance on the Education Law's citizenship requirements at the outset of its opinion (18 N.Y.S. 2d, *supra,* at 823), it goes on to state that the requirements are applicable on the college level. *Id.* at 824. The conclusion disregards the "public schools" limitation discussed above and confuses the "teacher's certificate" required by Education Law § 550(2) [now § 3001(2)] with a certificate evidencing appointment available to any public employee. *Ibid.**** The court also disregards the argument of the Corporation Counsel of the City of New York, representing the re-

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* The texts of the oaths included in Education Law §§ 3001-a and 3002 are identical. In both, the applicant fills in his "title" and the name of the "school, college, university, [etc.]" to which he is assigned. Appellees cite the "college" or "university" options in § 3001-a to support their argument that both §§ 3001-a and 3002 qualify public school teachers and college teachers. Brief, p. 75. They omit reference to the differences in the operative language of the two statutes.

** Emphasis was also placed on the fact that there had been no competitive examination for the position. *Id.* at 824-26.

*** If the citizenship requirements in Education Law § 550(3) were considered applicable to college professors, the certification requirements in § 550(2) also had to be applicable. See discussion, p. 2. Thus, the court was compelled to redefine "teacher's certificate" to support its conclusion.

spondent City Board of Higher Education, who urged the non-applicability of § 550(3). *Id.* at 823, 824. The Attorney General's opinion was not solicited, and there is no relevant opinion from either the state Appellate Division or Court of Appeals.

Education Law § 3001(3) requires formal application for citizenship and completion of the process in a timely manner, not a declaration of intent as appellees contend (brief, pp. 7-8, 61-63). See also Brief for *Amici Curiae,* pp. 7, 13, 30.* An application consists of filing both an application for a petition for naturalization and a petition. 8 U.S.C. §§ 1421, 1445(a)-(c). Filing a declaration of intent under 8 U.S.C. § 1445(f) does not suffice under § 3001(3) because it is not an application for citizenship under federal law.

The "citizenship" requirements in Education Law § 3001(3) are statutory, not regulatory or discretionary with the Commissioner of Education. Compare Appellees' Brief, pp. 8, 45-47, 99-101. They are codified in the first and second sentences of § 3001(3). The third sentence in § 3001(3), added in 1967, does not diminish the statutory force of the requirements. Compare Appellees' Brief, pp. 45-47, 99-101. It merely empowers the Commissioner to make regulations permitting the employment of aliens which are consistent with the limitations in the two preceding sentences and with other relevant statutes, i.e. § 3001-a, authorizing temporary certificates for first preference aliens under quota disabilities, and § 3005, authorizing temporary certificates for alien exchange teachers. Appellees' reading of the 1967 legislation as authorizing the Commissioner to certify all aliens under all circumstances

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* Aliens who do not have the capacity to apply for citizenship or to declare their intent to do so can obtain temporary certificates under 8 NYCRR § 80.2(i)(2) during the period of their incapacity. Aliens with the capacity to apply for citizenship can obtain temporary certificates only to meet emergent instructional needs. Appellants' Main Brief, pp. 7, 28. Compare Appellees' Brief, p. 9.

(brief, pp. 45-47, 99-101) disregards the history of the legislation as proposed and implemented and would deprive §§ 3001(3) (first and second sentences), 3001-a and 3005 of meaning.

When the Education Department proposed the 1967 legislation, it stated that the bill was intended to authorize only temporary certificates to meet exceptional needs. Memorandum of the Education Department in Support of L. 1967, c. 282, McKinney's 1967 Session Laws of New York ("1967 Session Laws") 1461 and Appellants' Main Brief, p. 8. It was to have no effect on the "citizenship" requirements for permanent certificates codified in the first and second sentences of § 3001(3). The bill was enacted (as L. 1967, c. 282, § 1) in the form proposed by the Department. It has always been construed and applied in conformity with the Department's initial statement about its limited scope. Section 80.2(i), Title 8 NYCRR, promulgated in its current form just after the 1967 legislation was adopted, is expressly limited to "provisional," or temporary, exceptional certificates. A subsequent proposal for a broader regulation granting permanent certificates to otherwise qualified non-applicant aliens was rejected by the Department's Office of Counsel on the ground that it was not authorized by the 1967 legislation. Memorandum, dated April 11, 1972, from James H. Whitney (Office of Counsel) to Charles C. Mackey, Jr. (Division of Teacher Certification) re: proposed amendment of Section 80.2(i), appended to this brief as Exhibit "A". Compare Appellees' Brief, pp. 45-47, 99-101. Appellants' view of the jurisdictional limitations incident to the 1967 legislation must be accepted as conclusive given appellees' failure to show any contrary indications in its history or implementation. *U.S.* v. *Larionoff,* 431 U.S. 864, 872 (1977); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 381 (1969). Moreover, acceptance of appellees' view that the Commissioner received "unchecked" discretion (brief, p. 100) under the 1967 legislation would, as the departmental memorandum

(Exhibit "A") observes, effectively repeal Education Law §§ 3001(3) (first and second sentences) and 3001-a (as well as § 3005) notwithstanding the Legislature's decision to leave those statutes in full force and effect.

New York provides the "cross-cultural" public education appellees contend is lacking (brief, pp. 31-33, 64-71) through its exchange teaching program. This program was first authorized in 1940 (L. 1940, c. 341, § 1, eff. July 1, 1940, adding § 552-a to the Education Law of 1910), substantially before the federal government evidenced a similar interest for either high school or college teachers. Compare Appellees' Brief, pp. 89-96. The educational aspects of the Mutual Educational and Cultural Exchange Act of 1961, P.L. 87-256, 22 U.S.C. §§ 2451-52, cited by appellees (brief, pp. 89-90), are concerned principally with undergraduate and graduate students and teachers and with scholars, scientists, and technicians. See 22 U.S.C. § 2452 (a)(1), (b)(1), (2), (4), (5), (7), (8), (9) and House Report No. 1094 (Aug. 31, 1961), accompanying H.R. 8666 (P.L. 87-256), 1961 U.S. CODE CONG. & ADMIN. NEWS 2759, 2761-62 ("H. Rep., p. "), noting that former legislation restricted Americans studying abroad to "institutions" of higher learning while the 1961 Act permitted less formal arrangements for similarly advanced study.* The

* The two other federal laws cited by appellees (brief, pp. 90-91) do not support their argument that Congress has comprehensively regulated the international exchange of high school teachers and/or that such laws as it has enacted are inconsistent with New York's limitations on permanent and temporary teaching certificates. The International Education Act of 1966, 20 U.S.C. § 1173, is limited to undergraduate and graduate education. It authorizes some English language training for foreign teachers as well as scholars and students [§ 173(a)(7)] but obviously intends that such skills will be employed in the teacher's own country and/or to advance his own studies. As of 1976, the Act had not received any funding. Senate Report No. 94-882 (May 14, 1976) accompanying S. 2657 (P.L. 94-482), 1976 U.S. CODE CONG. & ADMIN. NEWS 4713, 4812. The Education Amendments of 1976 to 20 U.S.C. § 512a do not authorize exchange programs. They encourage instruction about the "cultures and actions of other nations . . . [to enable American students] to better evaluate the international and domestic impact of major national policies." 20 U.S.C. § 512a(b).

exchange of secondary school teachers and prospective teachers under the 1961 Act appears to be confined to improving instruction in foreign languages and related national, or "area," studies. 22 U.S.C. § 2452(b)(6); H. Rep., p. 2765. The relevant legislative history specifically approves programs like those provided by New York under Education Law § 3005 (two year certificates for exchange teachers) and cites their success as the reason for increased federal aid. H. Rep., p. 2766.* Compare Appellees' Brief, pp. 92-96. Under both the 1961 Act and state law, the alien exchange teacher is treated as a temporary visitor. He obtains a temporary visa under 22 U.S.C. § 2459(b), (c) [amending 8 U.S.C. §§ 1101(a)(15), 1182 to add the nonimmigrant "J" visa classification] and a temporary teaching certificate under Education Law § 3005. H. Rep., pp. 2765-66, 2773-74.**

* The House Report states in part (p. 2766):

> "A more recent development in language training and area studies [as opposed to training American teachers abroad] is the employment for 1 or 2 years of a foreign teacher by local school boards. Frequently this is an arrangement whereby an American teacher exchanges his position with a foreign national.
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> • • •
>
> "The benefits of this program [the United States Information and Educational Exchange Act of 1948, as amended, the original federal legislation in this area] have been felt not only in the classroom but in the community in which the foreign teacher has lived and worked. This paragraph [§ 2452 (b)(6)] is intended to strengthen this type of teacher exchange in the language and area study fields."

** Congress also continued assistance to American schools abroad under 22 U.S.C. § 2452(b)(3). These schools must be established by American citizens, include citizens on the board of directors, have citizen principals and "a sufficient number of teachers from the United States to assure adequate contact for students with U.S. teaching methods and ideals." H. Rep., pp. 2763-64. They provide as American an education as possible for the children of government officials serving abroad and "an American 'educational presence'" in another country which demonstrates "American educational methods" and "influence[s] the development of the educational system of . . . [that] country." H. Rep., p. 2764.

B. Education Law Article 52-A provides for an experimental New York City Community School District System. The article has no effect on the statewide "citizenship" requirements for teaching certificates and is not inconsistent with them.

In 1969, the state Legislature enacted a decentralized commu.. y school district system for New York City (L. 1969, c. 330, § 4), not New York State as appellees (brief, pp. 9-10, 11, 48-52) suggest. See also Brief for *Amici Curiae,* pp. 26-27. The system was intended as an "innovative experiment in education" for nursery through ninth grades. L. 1972, c. 29, § 1, McKinney's Education Law §§ 2101-5500, 1977-78 Supp., p. 89; Education Law § 2590-e. Subsequent legislative modifications were expressly contemplated. See L. 1972, c. 29, § 1, McKinney's Education Law §§ 2101-5500, 1977-78 Supp., p. 89. In the last regular session, a bill (S. 6537) creating a temporary state commission to study the effectiveness of decentralization in meeting the educational needs of New York City pupils was introduced and referred to committee. The legislative findings supporting the need for the commission cite the absence of any improvement in reading and math levels during decentralization, voter disinterest in community school board elections, high per pupil cost and disparate inter-district costs and funding. S. 6537, § 1.*

Community school boards do not "govern" the schools within their geographic boundaries. Compare Appellees' Brief, pp. 10, 11, 48. The central New York City Board of Education makes all citywide policy. Education Law § 2590-g. The Chancellor prescribes minimum educational standards and curriculum requirements subject to the approval of the City Board and evaluates their effectiveness. Education Law §§ 2590-g(1), 2590-h(8). Compare Appellees' Brief, p. 50. Community school boards do hire and fire

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* A true copy of S. 6537 is appended to this brief as Exhibit "B".

teachers and select textbooks and other instructional material, but do so subject to the approval of the Chancellor. Education Law § 2890-e(2), (3). All three units in the community school district system, City Board, Chancellor, and community school boards, operate under other applicable state laws and regulations including those prescribing minimum curriculum standards (Appellants' Main Brief, pp. 9-10) and citizenship requirements for teachers. For example, a community school board cannot hire an alien teacher in violation of Education Law §§ 3001(3), 3001-a, 3005 and 8 NYCRR § 80.2(i). Thus, the vote of an alien parent for members of a community school board [Education Law § 2590-c(3)] and/or his membership on the board [§ 2590-c(4)] do not oppose the operation of § 3001(3) or the state interests it serves.* The very limitations on discretionary authority imposed by § 3001(3) and related provisions require the alien (or citizen) board member to enforce the Legislature's view of the qualifications that make public school teachers most effective.

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* The phrase "parent . . . who is a citizen of the state" in § 2590-c(3) and (4) has been construed to include aliens by the City Board and New York City Board of Elections. Appellees' Brief, p. 49 n. 34. An alternative construction of the phrase would require United States citizenship but not prior registration for general elections. See e.g. *C.D.R. Enterprises, Ltd.* v. *The Board of Education,* 412 F. Supp. 1164, 1166, 1167-68 (E.D.N.Y. 1976), *aff'd sub. nom. Lefkowitz* v. *C.D.R. Enterprises, Ltd.,* 429 U.S. 1031 (1977) wherein the phrase "citizens of the State of New York" in N.Y. Labor Law § 222 had been applied to exclude aliens. There is no legislative history on point, and appellants' research did not identify any uniform definition or use of the term "state citizen" in New York. All school districts outside New York City require citizenship for membership on the board of education or similar body (Education Law §§ 2012, 2102) and for voters at board elections. Education Law § 1602 (Common School Districts); § 1702 (Union Free School Districts); § 1804 (Central School Districts); §§ 2502, 2553 (certain City School Districts); § 2012 (requiring U.S. citizenship to qualify as a voter).

C. Education Law § 3001(3) is excepted from strict equal protection scrutiny because the public school teachers it qualifies make important discretionary decisions and execute broad public policy which substantially affects American democratic institutions. No fundamental right to academic freedom or of access to "common occupations" is invoked by the classification.

Classifications excluding aliens from governmental positions are excepted from strict scrutiny when the positions require "discretionary decisionmaking, or the execution of policy, which substantially affects members of the political community." *Foley* v. *Connelie,* 435 U.S. 291, 296 (1978). (Footnote omitted.) The excepted group of positions is more specifically defined in *Sugarman* v. *Dougall,* 413 U.S. 634, 647 (1973), as consisting of "elective or important non-elective executive, legislative, and judicial positions" because "officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." There are no additional or more objective criteria which distinglish between classifications subjected to or excepted from strict scrutiny. Compare Brief for *Amici Curiae,* pp. 15-27. No distinction is drawn between "policy makers" and "policy executors" or between "political" and "civil" rights. Compare Appellees' Brief, p. 23; Brief for *Amici Curiae,* pp. 16, 21-22, 24, 28-30. Nor has it been previously suggested that the use of the term "officers" in *Sugarman* v. *Dougall, supra,* was intended to confine the excepted group of positions to "sovereign," public officers as distinguished from public employees. Appellees' Brief, pp. 23-24, 25-27; Brief for *Amici Curiae,* pp. 18, 22.* The *Dougall*

* The use of such a test would be inappropriate in the adjudication of constitutional rights because the decision in any given case would depend on formal and often inconsistent state designations for the same or similar classes of positions. For example, if New Jersey designated Deputy Court Clerks as public officers and Pennsylvania designated them as public employees, the aliens excluded from the positions would probably lose the New Jersey case because of the application of the rational basis test and win the Pennsylvania case because of the application of strict scrutiny.

opinion itself uses the terms "public employment" and "employee" in the same context as the term "officers." 413 U.S., *supra,* at 647. At least one commentator has read the term "officers" in *Dougall* to include "jobs having a critical relationship to the preservation of the political community, even if those jobs cannot be classified as 'offices.'" Note, *Aliens' Right to Teach,* 85 YALE L.J. 90, 96 (1975). (Footnote omitted.) The allocation of positions between excepted and non-excepted categories is "functional" and should be based on the "actual relationship" between the position and the "political community." *Id.* at 99, noting, *inter alia,* that the exclusion of aliens from juries sustained in *Perkins* v. *Smith,* 370 F. Supp. 134 (D. Md., 1974), *aff'd* 426 U.S. 913 (1976), did not rest on a finding that jurors were public officers or high government officials. This view conforms with the direction in *Foley, supra,* to "examine" each position to determine whether it incorporates the qualities ("discretionary decisionmaking" or "execution of policy" and substantial effect on the "political community") which except it from within strict scrutiny.

The teaching positions Education Law § 3001(3) qualifies have an "actual relationship" with and a substantial effect on the "political community." Both the appellees and the *Amici Curiae* concede the controlling principles appellants advance on this point: first, public school education trains pupils to be citizens by providing them with the knowledge, skills, values and attitudes that enable and encourage participation in American democratic institutions (main brief, pp. 15-16, 20-23)* second, public school teach-

* Public school education is itself a matter of constitutional prerogative and protection in New York. N.Y. Const. Art. 11, § 1. Appellants' Main Brief, p. 8. See *Sugarman* v. *Dougall,* 413 U.S., *supra,* at 648. The state Education Department, charged with enforcing § 3001(3), is part of the executive branch of state government. N.Y. Const., Art. 5, §§ 2, 4. The Department, with the local school districts, 'monopolize" public education. Compare Appellees' Brief, p. 25.

ers are immediately and directly responsible for achieving this state interest in education (main brief, pp. 9-10, 18, 23-24); and third, the teacher instructs from curriculum materials and by his own example (main brief, pp. 16-17. 24-25).* Their opposing arguments merely claim that teachers do not make 'discretionary decisions' or 'execute policy' when they function in terms of the state interest and in the manner just described. Compare Appellants' Main Brief, pp. 16, 23-25 with Appellees' Brief, pp. 27-30 and with Brief for *Amici Curiae,* pp. 23-26, 28-30.** These arguments rely on descriptions of New York educational practices which have no foundation in state law or the record of this case. Their acceptance would attribute less governmental importance to public school teachers than to policemen and jurors although teachers are responsible for educating and encouraging their pupils to accept the public duties those positions entail. See *Brown* v. *Board of Education,* 347 U.S. 483, 493 (1954) and discussion, pp. 13-15.***

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* Appellees admit that a teacher's own values and attitudes are transmitted to his pupils. Brief, p. 65. They question only the "amount" of this influence. *Id.* at 65-66. See discussion, pp. 20-21.

** The *Amici Curiae* (brief, pp. 20, 27-28) argue, in addition, that teachers do not perform functions that "go to the heart of representative government" even if it is conceded that teachers participate directly in the "formulation, execution, or review of broad public policy." *Sugarman* v. *Dougall, supra.* The argument is inapposite because it is the very act of "formulating, executing or reviewing" public policy that *Dougall* views as "going to the heart of representative government." Even if the appropriateness of the argument is assumed, it must fail in face of the conceded purpose of public education to train pupils for their roles as citizens.

*** This Court's application of the strict scrutiny standard to Connecticut's exclusion of aliens from the bar in *In Re Griffiths,* 413 U.S. 717, 729 (1973), does not support the application of the

(footnote continued on following page)

New York public school teachers do not teach "a State-prescribed course of study in State-prescribed class situations." Brief of *Amici Curiae,* p. 23; Appellees' Brief, p. 28. State curriculum standards are "limited" and "generalized." Appellants' Main Brief, p. 9. For example, the curriculum for elementary schools requires instruction in "arithmetic, reading, spelling, writing, [etc.]." Education Law § 3204(3)(a)(1); 8 NYCRR § 100.1(e). See discussion and citations in Appellants' Main Brief, pp. 9-10, 30, 31. There are no other state laws or regulations that describe the content of the state standards more specifically and there is no support for the view that curriculum standards established by local school boards are more specific.* On the record of this case, the teacher retains the discretionary choice to communicate the information and skills he believes important in the subject matter areas under his control. Appellants' Main Brief, p. 24. Even if local curriculum standards are assumed to be specific and strictly enforced, they would not be more detailed than the penal

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(footnote continued from preceding page)

same standard to Education Law § 3001(3). Compare Appellees' Brief pp. 10, 29, 30, 34; Brief of *Amici Curiae,* pp. 25-26. The *Griffiths* classification included all lawyers only some of whom would participate in or have a substantial effect upon governmental institutions. Brief of *Amici Curiae,* pp. 35-36. The decision does not suggest that Connecticut could not qualify such governmental lawyers in terms of citizenship and/or that their responsibilities would be considered higher than those of public school teachers.

* The State Education Department does publish curriculum guides for elementary and secondary schools and Regents syllabi to assist teachers in preparing students for optional Regents examinations. These guides and syllabi are advisory and may be used in whole, or part, or discarded in the discretion of teachers and local school boards.

laws that policemen enforce. More significantly, curriculum standards are irrelevant to the teacher's communication of knowledge, skills, values and attitudes by his own example and to the various normative judgments he makes about the behavior, societal adjustment and career potential of his students. Appellants' Main Brief, pp. 23-25. Qualifying requirements like Education Law § 3001(3) are the only effective means for insuring that the teacher's example is in harmony with the purpose of his instruction and that he accepts the instructional framework which his judgments should reflect and in which they will operate. Appellants' Main Brief, pp. 19, 25.*

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* The results of the survey of state "citizenship" requirements conducted by the attorneys for the appellants and appellees (appended to this brief as Exhibit "C") do not diminish the importance of the responsibilities of public school teachers or the effectiveness of citizenship requirements in securing their appropriate execution. See Appellees' Brief, pp. 29, 56-60. Forty-four states plus Guam and Puerto Rico responded to the survey. Of this group, 10 require citizenship or a declaration of intent for all public school teachers or for permanent public school teachers under statutes that remain in full force and effect, i.e. Georgia, Idaho, Montana, North Dakota, Puerto Rico, South Carolina, Tennessee, Texas, Washington and West Virginia. Three, Mississippi, South Dakota and Wyoming, require citizenship or declarant status under statewide regulations. Ten (Alaska, California, Guam, Illinois, Massachusetts, Michigan, New Jersey, Oregon, Pennsylvania and Rhode Island) repealed or otherwise invalidated their "citizenship" requirements on counsel's advice that *Sugarman* v. *Dougall, supra*, or similar precedent required that result. Neither the Education Departments nor the professional educators in these 10 jurisdictions sought the repeal of the requirements or indicated that they were inappropriate or unnecessary for the achievement of the state interests involved. The remaining 23 jurisdictions do not have statewide citizenship requirements although it is unclear whether they have and enforce such requirements locally. As appears from these results, the reporting jurisdictions would be evenly balanced (23/23) with respect to statewide citizenship requirements if 10 had not erroneously (in appellants' view) anticipated the course of constitutional law.

New York public school teachers do not conduct their classroom activities "in the presence of other teachers, student teachers and teachers' aides" (Appellees' Brief, p. 29 n. 20), and they are not closely or continuously supervised by a superintendent or principal. *Id.* at 25 n. 18. For example, the average number of elementary school pupils for one teacher is 19.47; the average number of secondary school pupils for one teacher is 17.47. Elementary schools average 584 pupils each; secondary schools, 995 pupils. There are only 6,876 full-time and 15,606 part-time teacher aides to assist approximately 173,975 teachers.* There is usually one principal per school, and one superintendent per school district or community school district. Education Law §§ 2204, 2507, 2567, 2590-e(1)(a), 2590-h. These circumstances do not allow the "team" teaching approach appellees contemplate and do not lend themselves to detailed review of teacher conduct by principals or by aides even assuming that the latter practice were considered appropriate. At a minimum, the New York public school teachers cannot be viewed as more highly supervised than New York police officers who respond to the superior officers through a chain of command.**

Strict scrutiny cannot be applied to Education Law § 3001(3) on the alternative theory that the statute violates a "fundamental right" that aliens possess. Compare Appellees' Brief, pp. 31-33, 64-71 (alleged fundamental right to academic freedom); pp. 33-38 (alleged fundamental

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* The preceding figures were provided by the Education Department, Bureau of Teacher Education. See also Appellants' Main Brief, p. 13.

** *Ingraham* v. *Wright* is not opposed. One may accept the premise that there is sufficient interaction between pupils and parents, between pupils and teachers and between schools and the community to prevent and detect physical abuse of Eighth Amendment dimensions without agreeing that the same inter-actions provide a high degree of supervision for teachers or secure the purposes of Education Law § 3001(3). Compare Appellees' Brief, p. 39 n. 20.

right of access to "common occupations").* Indeed, acceptance of this theory would have the anomalous consequence of providing aliens (and only aliens) with a fundamental right to teach what their pupils have no fundamental right to receive. *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 37 (1973).

Appellees recognize (brief, pp. 31-32) that there is no constitutional or fundamental right to academic freedom standing alone, but only such rights as derive from the First Amendment protection of freedom of speech and freedom of association. See e.g. *Tinker* v. *Des Moines School District,* 393 U.S. 503, 505-507 (1969); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 603-604 (1967); *Shelton* v. *Tucker,* 364 U.S. 479, 485-86 (1960); *Sweezy* v. *New Hampshire,* 354 U.S. 234, 250 (1957). Education Law § 3001(3) has no cognizable effect on speech or association as those terms have been construed by this Court. Section 3001(3) does not prescribe or regulate the actual or symbolic speech of the teachers it includes, the applicants it excludes or of the pupils who receive instruction. See e.g. *Keyishian* v. *Board of Regents,* 385 U.S. *supra* at 597, 599, oath for college teachers there invalidated as vague regulated "treasonable and seditious" utterances and advocacy, advice or teaching a doctrine. Moreover, a public school teacher does not have a right to use his classroom as a platform for the free expression of his ideas. His speech may be restricted in order to promote the efficiency of the "public services" his school provides. *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968). See also *Tinker* v. *Des Moines School District,* 393 U.S., *supra* at 509, protecting armbands worn by pupils without disruption as speech, but stating that restrictions on speech in public schools could be justified by showing merely that they were not intended "to avoid the discomfort and unpleasantness that accompanies an unpopular viewpoint."

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* Appellees did not present these arguments to the three-judge district court. See Plaintiffs' Memorandum of Law, Record on Appeal, Document 10 ("R. Doc. "); Transcript of Proceedings on Feb. 11, 1976, R. Doc. 18; and Ennis letter, dated Feb. 23, 1976, to the three-judge court, R. Doc. 27.

Section 3001(3) is a qualifying requirement for public school teachers in New York. Its effect on the associational interest of an applicant for a teaching certificate is the same as the education, experience and character requirements New York also enforces and for which appellees do not suggest a First Amendment dimension. See Education Law § 3001(1), (2); 8 NYCRR Parts 7, 8.83. Even if an associational right were involved, it would not disable job-related inquiries. *Shelton* v. *Tucker,* 364 U.S., *supra* at 487-88.

'Orthodoxy,' 'standardization,' 'homogeneity' of ideas or coerced 'political identification' are not concomittants of the citizenship requirements established by § 3001(3). Compare Appellees' Brief, pp. 32-33, 41-44, 66-71. Section 3001(3) does not prescribe or proscribe subject matter or teaching methods. *Epperson* v. *Arkansas,* 393 U.S. 97 (1968) (proscription on teaching Darwinian theory); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923) (proscription on teaching foreign languages). It does not require a public school teacher to embrace an ideology, to agree with national, state, or local governmental policies, to join a political party or to submerge his cultural or ethnic differences. In fact, § 3001(3) contemplates the opposite behaviors. Becoming a citizen enables the permanent resident alien to make his own 'political' selections, to express his ideas and 'differences' effectively and to have them incorporated in the societal decisions which govern him. In sum, it permits him to do exactly what he wants to teach his pupils to do.

Appellees' argument that Education Law § 3001(3) affects a "fundamental right" of access to "common occupations" fares no better than their First Amendment claim. This right derives from the Due Process Clause of the Fourteenth Amendment, *Meyer* v. *Nebraska,* 262 U.S.,

supra, at 399; *Truax* v. *Raich*, 239 U.S. 33, 39 (1915), and has not been designated as "fundamental" for purposes of strict scrutiny. As appellees recognize (brief, p. 34 n. 24), it is merely a "short-hand way" of stating that applicants for employment should be free from limitations which are "unrelated" to their "ability" or capacity "to perform the job." Citizenship requirements are 'job-related' when they apply to positions which involve "discretionary decision making, or execution of policy, which substantially affects members of the political community," *Foley* v. *Connelie*, 435 U.S., *supra*, at 296, and public school teachers hold such positions. See discussion, pp. 11-15. The positions do not become "common occupations" because they are numerous. Compare Appellees' Brief, p. 35.

D. Education Law § 3001(3) meets all equal protection and due process standards because it precisely enforces New York's substantial interest in training public school pupils for their roles as citizens.

Appellees admit that New York's interest in training pupils to be citizens by "*imparting* democratic principles and attitudes" is "permissible." Brief, p. 42. (Emphasis original.) The *Amici Curiae* assume that it is "substantial" and "compelling." Brief, pp. 30, 31. Appellees' selection of the less significant designation relies on three contentions: First, the Legislature disclaimed any interest in excluding alien teachers from public schools in 1967 when it delegated power to make regulations on the subject to the Commissioner of Education (brief, pp. 45-47); second, the Legislature authorized aliens to govern public schools when it enacted the Community School District System for New York City (brief, pp. 48-53); and third, Education Law § 3001(3) is subject to inconsistent statutes and regulations which permit aliens to teach in private schools and to obtain temporary public school certificates (brief, pp. 53-55). Each of these contentions is false. As appellants have already shown (pp. 4-6 and

Exhibit "A"), the Legislature has not invested the Commissioner with regulatory power to oppose the citizenship requirements for permanent certificates established by § 3001(3), and it has not authorized aliens to govern public schools in New York City or community school boards to oppose the enforcement of § 3001(3) (pp. 8-9 and Exhibit "B"). Aliens can teach in private schools. While it is in New York's interest to protect the citizenship education private schools provide (at least to citizens and resident aliens), it is also in New York's interest to protect the "other values" they teach. Appellants' Main Brief, pp. 29-31. Appellees do not refute appellants' description of the differences between public and private schools and do not suggest any basis for changing the current accommodation between state interests that reflects the constitutional status of public schools, not private schools. N.Y. Const. Art. 11, § 1. Section 80.2(i), Title 8 NYCRR, authorizes only temporary certificates for public school teachers. Only aliens who are disabled from applying for citizenship and thus do not manifest the 'negative example' of the aliens excluded from permanent certificates by § 3001(3) can obtain certificates under § 80.2(i)(2).* Only aliens whose services are required on an emergent basis can obtain certificates under § 80.2(i)(1). See Appellants' Main Brief, pp. 7, 19, 27-28. Appellees do not suggest how New York could justify a failure to yield its interest in the most effective public education possible to its interest in some education under such circumstances.

Education Law § 3001(3) distinguishes between eligible and ineligible aliens on the basis of their capacity to participate in the institutional processes teachers 'impart' to their pupils by the content of their instructon and by their own example. The use of this criterion is relevant and does not result in an overinclusive classification. Appel-

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* The "negative example" of the permanent resident who refuses citizenship is enhanced by a lengthy stay. Accordingly, he does not become a more suitable teacher with each passing day. He becomes a less suitable one. Compare Appellees' Brief, pp. 61-62.

lants' Main Brief, pp. 25-27. Compare Appellees' Brief, pp. 11-12, 72-76; Brief for *Amici Curiae*, pp. 35-36.* No teacher from a foreign country can participate in the institutional processes he would have to impart no matter how much his country was 'like our own.' Compare Appellees' Brief, pp. 72-73. Any public school teacher in New York can be required to teach any subject at least part-time, and all teachers instill their own values and attitudes regardless of the subject they instruct. Appellants' Main Brief, pp. 24-25, 26-27. Compare Appellees' Brief, pp. 73-76; Brief for *Amici Curiae*, pp. 35-36. Teachers influence the political attitudes of their pupils in this manner throughout elementary and secondary school. See HESS & TORNEY, THE DEVELOPMENT OF POLITICAL ATTITUDES IN CHILDREN ("Political Attitudes in Children") 101, 217, 219 (1967), stating (p. 219) that the school is "the central, salient and dominant force in the political socialization" of the child. Appellees' references (brief, pp. 65 n. 45, 66 n. 47, 75 n. 58) to the same study, Political Attitudes in Children, pp. 214, 218, and to JENNINGS & NIEMI, THE POLITICAL CHARACTER OF ADOLESCENCE ("Political Character") 182, 183 (1974), admit the existence of this influence and the span of time involved.** Although the teacher's effect on his pupils may be strongest in nursery through eighth grades, Political Attitudes in Children, pp. 112, 114; Political Character, pp. 193, 217, it continues through high school, reinforcing the earlier-acquired attitudes of some pupils and affecting a significant number of pupils profoundly. Politi-

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* Contentions that Education Law § 3001(3) is underinclusive because it does not apply to private schools or because temporary certificates are authorized under 8 NYCRR are refuted above. See Appellees' Brief, pp. 53-55, 71-72; Brief for *Amici Curiae*, pp. 36-39. Appellees' additional contention (brief, *ibid.*) that § 3001(3) is underinclusive because it permits a "dual citizen" to obtain a permanent certificate is inapposite. Dual citizens can participate in the institutional processes they teach.

** Education Law § 3001(3) does not apply to college teaching See pp. 2-4. Compare Appellees' Brief, pp. 74-75.

cal Character, pp. 193-206. The only arguably open question about teacher influence is one of amount, and it is occasioned by the current limits of quantitative measurements, not doubt among experts about its existence. Political Attitudes in Children, p. 111; Political Character, pp. 182, 328. Strict scrutiny should not be applied adversely to appellants for this reason since no statutory program could ever be more precise than the state of art in the field it regulates allows. Moreover, the question, if relevant at all, is an evidentiary one more appropriately considered on remand of this case. Appellant's Main Brief, pp. 32-33.*

A loyalty oath is not a "less drastic means" for enforcing the interests Education Law § 3001(3) reflects. Compare Appellees' Brief, pp. 55-56; Brief for *Amici Curiae*, pp. 31-32, 32-35. Taking an oath does not enable an alien to participate in the institutional processes he would 'impart' as a teacher, and accordingly, it cannot be viewed as satisfying the interests § 3001(3) serves. Conversely, application for citizenship and timely completion of the process is relevant to these interests. When the alien accepts the inclusionary requirement, he becomes a positive example of the principles he must impart to his pupils. If he rejects the requirement, he continues to be a 'negative example.' See Appellants' Main Brief, p. 25. All aliens excluded from permanent certificates have in fact made this choice. Given that their choice disqualifies them under the classification's express terms, they cannot

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* Appellants' offer of proof to the district court was procedurally correct. Compare Appellees' Brief, p. 102. The offer was made in response to the invitation of the court (Transcript of Proceedings on Feb. 11, 1976, R. Doc. 18, p. 30), which contemplated post-argument submissions by both sides. *Id.* at pp. 9, 30. See Gordon letter, dated Feb. 19, 1976, R. Doc. 26, and Ennis letter, dated Feb. 23, 1976, R. Doc. 27. The offer did not oppose appellees' fact statement, but would have provided the court with evidence on the 'necessary relation' issue if such evidence was required or appropriate under strict scrutiny.

be qualified by some other means. Compare Brief of *Amici Curiae,* p. 32.

If, as appellants contend, Education Law § 3001(3) survives strict equal protection scrutiny, it also survives heightened due process standards. See Appellees' Brief, pp. 96-101; Brief of *Amici Curiae,* pp. 55-62. *Weinberger* v. *Salfi,* 422 U.S. 441 (1975); *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632, 39 L. Ed. 2d 52, 66-70 (1974) (POWELL, J., concurring in result); 39 L. Ed. 2d, *supra,* at 70-72 (REHNQUIST, J., dissenting); *Vlandis* v. *Klein,* 412 U.S. 441, 459-63 (1973) (BURGER, C.J., dissenting); *Stanley* v. *Illinois,* 405 U.S. 645, 662 (1972) (BURGER, C.J., dissenting).

E. No general or specific federal laws pre-empt Education Law § 3001 (3).

State laws affecting aliens are not *per se* pre-empted by the federal constitutional power over immigration and naturalization whether latent or exercised. *De Canas* v. *Bica,* 424 U.S. 351, 355 (1976); *Graham* v. *Richardson,* 403 U.S. 365, 372 (1971); *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 420 (1948). Compare Appellees' Brief, pp. 78-79; Brief for *Amici Curiae,* pp. 63-65. The Immigration and Nationality Act of 1952, 8 U.S.C. § 1101 *et seq.,* does not prevent the states from conditioning the employment of aliens on the acquisition of citizenship. Compare Appellees' Brief, pp. 84-89. To the extent that the Act speaks to this subject at all, it must be read as approving such conditions. Although no longer part of the naturalization process, the declarant provision [8 U.S.C. § 1445(f)] continues in force evidencing Congressional awareness of the state (and federal) laws that utilize such requirements.

Section 1981, Title 42 U.S.C., does not prevent states from conditioning the public employment of aliens on the acquisition of citizenship. Compare Appellees' Brief, pp. 79-83. Such employment is not a matter of "security of

persons and property" within the meaning of the statute. *Heim* v. *McCall,* 239 U.S. 175, 193-94 (1915), construing identical language in a treaty with Italy and sustaining exclusion of aliens from employment on public works; *Patsone* v. *Pennsylvania,* 232 U.S. 138, 145 (1914), construing same language and sustaining prohibition on aliens hunting wild game.

In light of these considerations, appellees' pre-emption argument can only be sustained if § 3001(3) " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' " in enacting the Immigration and Nationality Act. *DeCanas* v. *Bica,* 424 U.S., *supra,* at 363 quoting *Hines* v. *Davidowitz,* 312 U.S. 52, 67 (1941) and *Florida Avocado Growers* v. *Paul,* 373 U.S. 132, 141 (1963). In this context, the Court determines if the statute under review discriminates against lawfully admitted aliens by imposing "additional burdens not contemplated by Congress." *DeCanas* v. *Bica,* 424 U.S., *supra,* at 358 n. 6. *Takahashi* v. *Fish & Game Commission,* 334 U.S., *supra,* at 419. See Appellees' Brief, pp. 81-87; Brief for *Amici Curiae,* pp. 65-67. The phrase "additional burdens" is confined to broad-based discrimination which denies aliens the ability to earn a livelihood or to obtain the other necessities of life since only these kinds of limitations would amount to denial of "entrance and abode." *Truax* v. *Raich,* 239 U.S., *supra,* at 42. With respect to employment, only state limitations which deny access to "common occupations" reach the proscribed level. Any other view is inconsistent with *Foley* v. *Connelie, supra,* and *Sugarman* v. *Dougall, supra,* which permit aliens to be excluded from important governmental positions. As shown (pp. 11-15, 17-18), Education Law § 3001(3) is not a limitation on a "common occupation" and thus cannot be viewed as an "additional burden" on any Congressional program.

The fact that alien teachers receive a third preference [8 U.S.C. §§ 1102(a)(32), 1153(a)(3)] requiring labor cer-

tification when they enter the United States as permanent residents [8 U.S.C. § 1182(a)(14)] does not oppose § 3001 (3). Compare Appellees' Brief, pp. 85-89.* These provisions do not prevent states from conditioning employment on the acquisition of citizenship. In fact, certification procedures are usually initiated by the incoming alien's prospective employer. Assuming that a New York school board would seek such an employee, the board would enforce § 3001 (3) and the alien would be so advised while still in his native country. Elementary and secondary school teachers are not on the 20 C.F.R. § 656.10 "A" list which permits an alien to enter the United States without a pre-existing employment contract, and there is no indication that they ever have been.

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* The record does not indicate that appellees entered the United States under these provisions.

CONCLUSION

For the foregoing reasons and those set forth in Appellants' Main Brief, the Order and Judgment below should be reversed and Education Law § 3001 (3) declared constitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Alternatively, the Order and Judgment should be vacated, and the case remanded for a hearing on the necessary relation between the classification established by the statute and New York's interest in educating public school children for participation in American democracy.

Dated: New York, New York
January 5, 1979

Respectfully submitted,

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* The Attorney General gratefully acknowledges the assistance of Theresa Wolinski, Legal Aide, in the preparation of this brief.

Exhibit "A"

6970/2/99999/7985

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

To: Mr. Charles C. Mackey, Jr. Date: April 11, 1972

From: James H. Whitney JHW

Subject: Proposed amendment of Section 80.2 (i) of the Regulations of the Commissioner

I have reviewed your proposed amendment to eliminate the citizenship requirement for permanent certification. It is the opinion of this Office that the Commissioner lacks the statutory authority to promulgate the proposed amendment. While the 1967 amendment of subdivision 3 of section 3001 is broad in language, this provision must be read together with section 3001-a of the Education Law. The latter section specifically contemplates temporary service as a teacher by those aliens who are unable to become citizens because of an over-subscribed immigration quota. The Regulations presently reflect the legislative intent expressed in section 3001-a. I do not believe one can argue that the Legislature impliedly repealed section 3001-a when they amended the last sentence of subdivision 3 of section 3001.

I therefore suggest that you consider proposing legislation for the 1973 Legislative Session which would clearly express the intention to permit aliens to become permanently certified as teachers. This should be done through the normal channels for submitting legislation as a part of the Regents legislative program.

JHW:ms

Exhibit "B"

Senate Bill 6537

was illegible as printed

and was therefore not reproduced.

Exhibit "C"

States	Statute	Regulation	Provision repealed or invalidated in response to Graham v. Richardson, 403 U.S. 365 (1971); Sugarman v. Dougall, 413 U.S. 634 (1973), and related cases
Nebraska	none	none	
Nevada	none	none	
New Hampshire	no response		
New Jersey	NJSA §§ 18A:26-1 18A:26-8.1, 18A:28-3, 18A:6-39 require citizenship or declaration for teaching certificates.	Regs. implement statute	1974 Atty. Gen. Op. found citizenship requirement unconstitutional relying on Dougall and In re Griffiths but would allow requirement for specific classes of teaching positions for reasons shown.
New Mexico	none	none	
North Carolina	none	none	
North Dakota	No. Dakota Century Code § 15.36.07, 15-36.11, requires citizenship or declaration for teaching certificate. Non-citizen can get a temporary certificate renewable annually.	none	
Ohio	none	none	
Oklahoma	no response		
Oregon	none	none	Former citizenship requirement for teaching certificate repealed in 1973 as a result of a lower court decision.
Pennsylvania	none	none	Penn. Code Title 22, § 49-12 required U.S. Citizenship or declaration. Repealed in 1977 based on 1973 Atty. Gen. Op. relying, inter alia, on Graham.
Puerto Rico	Title 18 of Laws of Puerto Rico Ann. § 204 requires either U.S. or Puerto Rican citizenship for teaching certificates.	same	
Rhode Island	none	none	
South Carolina	Code of Laws of South Carolina §59-25-120 (1976) requires citizenship or declaration for teaching certificates.	same	
South Dakota	none	SDCL § 13-42-6 requires citizenship or declaration for all public employment, may be waived.	
Tennessee	Tenn. Code. Ann. § 49-1303 requires citizenship for teaching certificates. Non-citizens may obtain tempoary certificates.	none	
Texas	Vernon's Texas Code Ed. Code Ann. 13-044 citizenship or declaration for teaching certificate.	Non-declarant may obtain temporary certificate for up 5 years.	
Utah	none	none	
Vermont	none	none	
Virginia	none	none	
Washington	RCW 28A.67.020 requires citizenship or declaration for teaching certificates. Non-declarants may obtain temporary certificates.	none	
West Virginia	Code 18A-3-1 requires citizenship or declaration for teaching certificate.	none	
Wisconsin	none	none	
Wyoming	none	Citizenship or declaration required for teaching cerfiticates.	

Survey of State "Citizenship" Requirements for Public School Teachers

States	Statute	Regulation	Provision repealed or invalidated in response to Graham v. Richardson, 403 U.S. 365 (1971); Sugarman v. Dougall, 413 U.S. 634 (1973), and related cases
Alabama	none	none	
Alaska	none	none	Pre-1976 regulation required oath which only citizens had capacity to take. Modified after Dougall.
Arizona	none	none	
Arkansas	no response		
California	none	none	Pre-1970 statute required citizenship. Considered invalid after Purdy & Fitzpatrick Co. v. California, 456 F. 2d 645 (1969).
Colorado	no response		
Connecticut	none	none	
Delaware	none	none	
Florida	no response		
Georgia	Ga. Code Ann. § 89-106 generally excludes aliens from public employment. Aliens may be employed if citizens are not available.	none	Atty. Gen. Op. #76-74 issued after Dougall declared citizenship requirement unconstitutional Opinion adopted in 1976 by Board of Regents for teaching positions in public universities
Guam	none	none	Pre-1975 teachers were required to be U.S. Citizens, Govt. Code of Guam Title XII § 11300. Statute was repealed in 1975, Public Law 12-207.
Hawaii	none	none	
Idaho	Idaho Code §33-1202 requires citizenship or intention to become such for teaching certificate.	none	
Illinois	Ill. Rev. Stat Ch. 122 § 21-1. requires citizenship or declaration for teaching certificate.	same as statute	Attorney General Op. #S747 declared citizenship requirement unconstitutional, relying inter alia, on Dougall, In re Griffiths, 413 U.S. 717 (1973) and Graham.
Indiana	no response		
Iowa	none	none	
Kansas	none	none	
Kentucky	none	none	
Louisiana	none	none	
Maine	none	none	
Maryland	none	none	
Massachusettes	MGLA Ch. 71 §38G Ed. Law requires applicants for teaching certificates to be citizens. Declarants may obtain two year certificate, renewable twice.	Mass. Regs. Vol. VIII Part 3 at 138-140 repeats statute.	St in op Do
Michigan	none	none	Fo ci te on Op re an 71
Minnesota	none	none	
Mississippi	none	Ed. Dept. regs. require applicants for certification to be U.S. citizens.	
Missouri	none	none	
Montana	School Laws of Montana §§ 75-6004(3), 64-6005 (1971) require citizenship for teaching certificate.	same as statute	

MOTION FILED
FEB 8 1977

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA, as Director of Teacher Education and Certification of the Education Department of the State of New York

and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York

Appellants,

against

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION AND BRIEF ON BEHALF OF AMICI WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ASIAN-AMERICAN LEGAL DEFENSE AND EDUCATION FUND

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IN THE
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Appellants,

against

SUSAN M. W. NORWICK

Appellee,

TARJA U. K. DACHINGER,

Intervenor Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Mexican American Legal Defense and Educational Fund, the Asian-American Legal Defense and Education Fund, and the Washington Lawyers' Committee for Civil Rights Under Law hereby move the Court, pursuant to Rule 42(3) of its Rules of Practice, for leave to file the attached brief as amici curiae in support of affirmance of the judgment below. This motion and the attached brief are timely filed within the time allowed for filing of Appellees' brief on the merits. Appellees have, through counsel, given consent to the filing of this brief. Appellants have declined to consent to this filing, but, through counsel, have advised proposed amici that they will not oppose this motion for leave to file the attached brief amici curiae.

The Mexican American Legal Defense and Educational Fund (MALDEF) was founded in 1968 as a non-profit corporation under the laws of the State of Texas. It is headquartered in San Francisco, with additional offices in San Antonio, Los Angeles, Denver, and Washington, D.C. MALDEF's primary purpose is to secure the civil rights of persons of Mexican descent through litigation and education. MALDEF's client group includes approximately six million Mexican American citizens and permanent resident aliens.

The Asian-American Legal Defense and Education Fund is a national organization, headquartered in New York City. Its purpose is to defend the civil rights of Asian-Americans through litigation and education.

Its constituency includes over two million Asian-American citizens and permanent resident aliens. Those aliens are concentrated in the large industrial states of New York, California, and Illinois.

The Washington Lawyers' Committee for Civil Rights Under Law is one of a number of local affiliates of the National Lawyers' Committee for Civil Rights Under Law. The National Committee was organized in 1963 at the request of the President of the United States to involve private attorneys throughout the country in the national effort to assure equal rights for all members of this society. The National Committee's membership today includes three former Attorneys General, eleven past Presidents of the American Bar Association, two former Solicitors General, a number of law school deans, and many of the nation's leading lawyers.

The Washington Lawyers' Committee has established an Alien Rights Project to provide volunteer legal representation before courts, agencies, and legislative bodies in matters involving the constitutional rights of non-citizens. With the assistance of volunteer private attorneys, the Committee currently is handling twenty-five employment discrimination actions against public sector employers. The Washington Lawyers' Committee also represents numerous aliens in naturalization proceedings and political asylum cases, and in matters which involve equal protection and due process issues.

In support of this motion, proposed amici state that their interest in this case arises out of their long-standing concern for ensuring the full vindication of the constitutional rights of the nation's substantial non-citizen population to equal protection and due process of the law. While the civil rights problems of Mexican Americans and Asian-Americans have much in common with those of other minority groups, in many respects they are unique. The facts and questions we discuss thus differ from those briefed by Appellees, who are citizens of Great Britain and Finland.

Appellees are members of national origin groups which are not ordinarily considered the object of discrimination except that based on alienage. Proposed amici, however, represent members of groups who have been subject to discrimination based on race and ethnic origin as well as alienage. Thus, proposed amici bring to this case perspectives different than those of the parties.

Proposed amici are actively involved in judicial, legislative, and administrative proceedings which concern matters which the resolution of this case may significantly affect. One such issue is bilingual education. Many Mexican American and Asian-American public school children have a right to bilingual educational opportunities. New York, a State with a large Mexican American and Asian-American population, excludes from the workforce a significant number of persons likely to have the bilingual, bicultural skills needed by those children. The statute at issue thus has a particular impact on proposed amici's constituencies.

In addition, through proposed amici's participation in naturalization proceedings and political asylum cases, we are particularly experienced with matters which reflect a non-citizen's commitment to democratic principles and institutions. This experience belies Appellant's assertion that non-declarant aliens lack sufficient commitment and thus should be barred from the public school teaching profession.

For the reasons stated above, the Mexican American Legal Defense and Educational Fund, the Asian-American Legal Defense and Education Fund, the Washington Lawyers' Committee for Civil Rights Under Law move that the Court grant them leave to file their brief as amici curiae.

Respectfully submitted,

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INTERESTS OF AMICI CURIAE

The Mexican American Legal Defense and Educational Fund (MALDEF), the Asian-American Legal Defense and Education Fund, and the Washington Lawyers' Committee for Civil Rights Under Law are civil rights organizations. Our interest in this case arises out of our efforts to protect the constitutional rights of the nation's substantial non-citizen population.

Many of our constituents, or their immediate family, relatives and associates, are recent immigrants. They, or their forefathers, have come to our shores hopeful that America would afford them an equal opportunity to demonstrate their individual merit and ability. Their decisions to leave their homelands in search of a new beginning demonstrate beyond question their commitment to and appreciation of democratic principles and American institutions.

This nation's constitutional commitment to honor and ensure the dignity of each individual, regardless of nationality, race or ethnic origin, and its commitment to principles of equal protection and due process of law are of paramount importance to those we represent. These principles have inspired the hopes of many that, in America, they indeed would enjoy the freedom and opportunity to realize their full potential, and, in so doing, to contribute significantly to the community they have chosen to make their own.

Yet, at various stages in American history, particularly during periods of high unemployment and economic uncertainty, non-citizen members of this society have been denied the promise of self-dignity and equal opportunity which our Constitution holds out to all. In the period following the First World War--a time of high unemployment and economic uncertainty--various statutes were enacted, including New York Education Law § 3001(3), which by design or effect subjected our non-citizen population to discriminatory treatment at the hands of state governments. Such legislation, which often utilized classifications based upon alienage to reserve opportunities in particular professions to citizens, reflected fallacious and prejudicial assumptions about the nation's non-citizen population. Moreover, as these amici are particularly aware, classifications based on alienage often have reflected invidious and erroneous assumptions about particular racial and ethnic groups.

Classifications based on alienage, such as the classification incorporated in New York Educational Law § 3001(3), impose a badge of inferiority upon the constituencies amici represent. Moreover, by explicitly singling out aliens for discriminatory treatment, such legislative schemes intensify the stigma and injury suffered by individual class members, and enhance racial and ethnic prejudice by legitimizing the demeaning stereotypes upon which the classification is based. Nothing could be more offensive to the fundamental democratic principle of the dignity of each individual.

In 1978, the nation again is experiencing a period of high unemployment and economic uncertainty. As civil rights organizations dedicated to ensuring the constitutional rights of our non-citizen population, amici are particularly aware of the intensification of anti-alien sentiments, sentiments reflected in the media, public opinion, and recently enacted or proposed state and federal legislation. The irony of New York's decision to attempt to defend in 1978 an alienage classification first enacted in 1918 is not lost upon us. New York's defense of the indefensible assumption that aliens as a class lack commitment to and are unfit to teach in public schools unless they declare an intention to seek American citizenship, sharply demonstrates the importance of our efforts and this Court's responsibility to uphold against attack the Constitution's fundamental command that all persons, regardless of race, ethnic origin or nationality, are entitled to equal protection and due process of law.

These considerations and concerns underlie numerous decisions of this Court which have held that classifications based on alienage should be subjected to strict judicial scrutiny. Amici are especially sensitive to the importance of strict judicial scrutiny. In our work, we continually are made aware of the persistence of the anti-alien sentiments which often underlie such classifications. The pattern of legislative responses to our efforts to represent the rights and interests of aliens in Congress and State Legislatures starkly reminds us of the fact that aliens are politically powerless.

Our interest in this case thus reflects our belief that strict judicial scrutiny of classifications based on alienage provide the non-citizen members of this society their only true protection against the discriminatory legislation to which -- because of their race, ethnic origin or alienage -- they often have been subjected. However, the context in which this case arises is also of significance. New York employs approximately 174,000 public school teachers, and our non-citizen constituents have a great interest in the vindication of their constitutional rights to an equal opportunity to compete for those, and other public sector, positions. In this regard, we discuss in some detail principled and objective criteria for determining which public sector positions may constitutionally be reserved for citizens.

Finally, this case involves for amici the confluence of the most fundamental of democratic principles--the dignity and self-worth of each individual member of this society, the importance in a democracy of a system of education which emphasizes the importance of free inquiry and the constant testing of ideas and assumptions, and the overriding significance of the principle that all persons are entitled to the equal protection and due process of law.

SUMMARY OF ARGUMENT

Aliens are denied the opportunity to participate directly in the political process. They are thus especially susceptible to statutory classifications based upon erroneous and invidious assumptions. Their political powerlessness also exposes them to the great risk that legislative enactments capriciously or malevolently undervalue their rights and interests. The history of discriminatory legislation to which aliens have been subjected documents their status as a discrete and insular minority.

Classifications based on alienage are subject to strict judicial scrutiny. Strict scrutiny provides aliens their only protection against the discrimination to which they have often been subjected. Strict scrutiny is required to ensure that the legislature did not act on the basis of inaccurate stereotypes, that the real purpose of the classification is not different from the one asserted, and that there is no less discriminatory means of achieving a legitimate and compelling state interest. The availability of less discriminatory means, or lack of congruence between the classification and its asserted purpose, requires invalidation of the legislative scheme.

New York Education Law § 3001(3) denies non-declarant aliens any opportunity to secure positions as public school teachers. A State cannot constitutionally bar aliens from public school teaching positions. Public

school teachers are not direct participants in the formulation, execution or review of broad public policies. Nor do they perform a function that goes to the heart of representative government. The policy making authority and plenary discretion vested in voters, jurors and police are not vested in public school teachers. Teachers do not exercise sovereign authority. Teachers do not govern.

New York Education Law § 3001(3) cannot withstand strict scrutiny or any lesser standard of judicial review. The classification simply does not serve the purposes for which it was created. It allows certification of citizens and declarant aliens who have no commitment or loyalty to democratic values but denies certification to non-declarant aliens who have that commitment and loyalty. The State is constitutionally obligated to act in furtherance of its asserted purposes through more precisely tailored means: the State's present certification and oath requirements provide the unique opportunity for that precision. In addition, the statute unconstitutionally establishes irrebuttable presumptions--presumptions that serve only to perpetuate longstanding misconceptions about an identifiable segment of the community.

The suspect character and irrationality of New York Education Law § 3001(3) is manifest. The statutory scheme denigrates the right of every person -- citizen and alien alike -- to be judged on the basis of his or her individual character and ability. It repudiates the importance in a system of self-government of the constant testing of ideas and assumptions. The statute is antithetical to democratic values and constitutional requirements.

I. STRICT JUDICIAL SCRUTINY IS REQUIRED OF CLASSIFICATIONS THAT DISCRIMINATE AGAINST ALIENS

Throughout American history, particularly during periods of high unemployment and economic uncertainty, aliens have suffered purposeful, unequal treatment at the hands of state governments. This history of discrimination reflects not only the exclusion of aliens from the political process and legislative judgments based upon inaccurate, invidious stereotypes, but also racial prejudice. It is the political powerlessness of aliens, together with the racial prejudice and history of purposeful discrmination to which they have been subjected, that warrant, and indeed require, strict judicial scrutiny of a classification such as that embodied in New York Education Law § 3001(3).1/

1/ This Court recognized in Graham v. Richardson, 403 U.S. 365 (1971), that "[a]liens as a class are a prime example of a 'discrete and insular' minority . . . for whom . . . heightened judicial solicitude is appropriate." Id. at 372. Accord, Nyquist v. Mauclet, 432 U.S. 1, 7 (1977); Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 602 (1976); In re Griffiths, 413 U.S. 717, 721

A. Classifications Based Upon Alienage Are Inherently Suspect and Subject to Strict Judicial Scrutiny

From the time they choose to come to the United States, aliens are saddled with disabilities and government-imposed obligations that are not imposed on citizens. Before they are permitted entry into the United States, immigrants must respond to a barrage of questions concerning their political beliefs and life styles which would violate fundamental constitutional rights if asked of citizens.2/ Once the proper answers are supplied, an alien is permitted to enter the United States, but that entry

Cont'd. from prev. page

(1973); Sugarman V. Dougall, 413 U.S. 634, 642 (1973).

2/ [I]n the exercise of its broad power over immigration and naturalization, "Congress regularly makes rules that would be unacceptable if applied to citizens."

Fiallo v. Bell, 430 U.S. 787, 792 (1977), quoting Mathews v. Diaz, 426 U.S. 67, 80 (1976). Compare 8 U.S.C. § 1182(a)(28), with Baird v. State Bar of Arizona, 401 U.S. 1 (1971).

is conditioned in a variety of ways not permitted with respect to citizens entering or leaving the country.3/

Once in the United States, additional disabilities are imposed. Thus, for example, aliens must always have in their personal possession federal registration documents and annually must report their whereabouts to the federal government.4/ Further, they are always subject to the federal government's power of deportation--a power that can reach back into an alien's past and even into the past of the naturalized citizen.5/ New York State is attempting to impose an additional disability which would preclude Appellees from working in their chosen profession.

It is beyond question that aliens have suffered a history of purposeful unequal treatment at the hands of state governments.6/ The statutes imposing

3/ See, e.g., Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

4/ 8 U.S.C. §§ 1304, 1305.

5/ 8 U.S.C. §§ 1251 (deportation), 1451 (revocation of naturalization).

6/ While this case pertains to employment discrimination against aliens, the history of unequal treatment encompasses far more than the right to earn a living in the

unequal treatment on aliens with respect to employment have run the gamut from those discriminating in all positions--"regardless of kind or class of work, or sex of workers"7/-- to those which selectively discriminate and, for example, impose citizenship requirements on dentists but not optometrists, on physical therapists but not practical nurses, on professional engineers but not architects. 8/ That unequal treatment is the result

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common occupations of the community. For example, in 1976 the Supreme Court of Virginia invalidated a criminal statute that presumed that if a sawed-off shotgun was in the possession of an alien, it was possessed "for an offensive or aggressive purpose." Sandiford v. Commonwealth, 217 Va. 117, 225 S.E.2d 409 (1976), invalidating Va. Code § 18.1-268.4 (Cum. Supp. 1975).

7/ Truax v. Raich, 239 U.S. 35 (1915), quoting Laws of Arizona, 1915, Initiative Measure, p. 12.

8/ Kulkarni v. Nyquist, 446 F. Supp. 1269, 1272 (N.D.N.Y. 1977), discussing New York Education Laws §§ 6604(6) (dentists), 7104(6) (optometrists), 6534(6) (physical therapists), 6905(6) (practical nurses), 7206.1(6) (professional engineers), and 7304.1(6) architects. Kulkarni invalidated citizenship

of state legislatures acting on the basis of inaccurate sterotypes and not acting to further any legitimate, let alone substantial, state concerns.

This history of purposeful discrimination reflects not only legislative reliance upon inaccurate and invidious stereotypes, but also explicit racial prejudice.9/ The racial impact of

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requirements for civil engineers and physical therapists. New York State enacted a citizenship requirement for animal health technicians in 1976. Brief of Appellants at 31 n.**, citing N.Y. Education Law § 6711(6)) (McKinney's Supp. 1977-78). See also Examining Board v. Flores de Otero, supra (civil engineers); In re Griffiths, supra (lawyers); Sugarman v. Dougall, supra (civil servants); Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948) (fishermen); Truax v. Raich, supra (cook); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (laundryman).

9/ See generally J. Higham, Strangers in the Land (1969); H. Kallen, Culture and Democracy in the United States (1951); H.R. Doc. No. 520, 82d Cong., 2d Sess. (1952) (President Truman's Message to the House of Representatives vetoing the Immigration and Nationality Act of 1952).

that unequal treatment is particularly manifest when the history of federal immigration and naturalization laws is considered in light of the New York statute here at issue. The federal government's first naturalization statute, enacted in 1790, restricted eligibility to free white persons.10/ This limitation was patently intended to exclude Negro slaves and Indians from full citizenship benefits.11/ It was not until enactment of the Nationality Act of 1940 that eligibility for naturalization was extended to races indigenous to the Western Hemisphere.12/

Racial exclusions in the naturalization laws, like those in the immigration laws, were enforced chiefly against Asians.13/ For example, the Chinese Exclusion Laws specifically barred Chinese from becoming citizens, and those laws were not repealed until 1943.14/ It

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10/ Act of March 26, 1790, 1 Stat. 103.

11/ See Ozawa v. United States, 260 U.S. 178 (1922).

12/ Nationality Act of 1940, § 303, 54 Stat. 1140.

13/ See generally Gordon, "Racial Barriers to American Citizenship," 93 U. Pa. L. Rev. 237 (1945).

14/ Act of May 6, 1882, 22 Stat. 58; Act of December 17, 1943, § 3, 57 Stat.

was not until enactment of the Immigration and Nationality Act of 1952 that all racial discrimination in this country's immigration and naturalization laws was eliminated.

As enacted in 1918, N. Y. Education Law § 3001(3) required aliens to declare an intent to become United States citizens--and in due course become citizens--in order to be permanently certified as public school teachers. But some aliens, barred from citizenship because of their race, would never have been able to declare that intention. It was not until after 1967 that persons statutorily barred from citizenship were exempted from Section 3001(3)'s application.15/ Thus, historically, the New York statute, when read together with the restrictive federal naturalization laws, denied certain aliens, because of their race as well as their alienage, any opportunity to compete for public school teaching jobs. In light of this history,

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601. Decisions of this Court in the 1920's held that Japanese, Hindis, and Pilipinos were not white persons and thus were ineligible for citizenship. Ozawa v. United States, supra (Japanese); United States v. Thind, 261 U.S. 204 (1923) (Hindis); Toyota v. United States, 268 U.S. 402 (1925) (Pilipinos).

15/ 8 NYCRR § 80.2(i).

strict judicial scrutiny of the statute is appropriate.

Finally, the most salient justification for strict judicial scrutiny of classifications based upon alienage is that aliens as a class are relegated to a position of political powerlessness vis-a-vis the majoritarian political process.16/ Lesser standards of review operate on the assumption that the legislation at issue is a compromise reached between all groups who stand to be affected by the legislation. Those groups--protected by a history of case law guaranteeing their equal access to the ballot and legislature17/--have an opportunity to pursue their own interests, no matter how special those interests might be, and have an opportunity to persuade others to support those interests. It is assumed that this political process will at various times produce victories as well as defeats for

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16/ See San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28 (1973).

17/ See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972); Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1961).

the groups represented.18/ And there is nothing suspect about the process itself when the defeat acts to the disadvantage of a group having adequate--and equal--representation. Thus, legislation which indeed is the product of the "give and take" of the political process has been afforded a presumption of constitutionality.19/

18/ Viewed historically, and realistically, some of the victories represent a sharing of the "spoils" of the system.

> The widespread exclusion of aliens from [public employment] today may well be nothing more than a vestige of the historical relationship between nonvoting aliens and a system of distributing the spoils of victory to the party faithful.

Foley v. Connelie, 98 S.Ct. 1067, 1077 (1978) (Stevens, J., dissenting). The "spoils system" as the theoretical underpinning of the "special public interest" doctrine has been used by the States to justify discrimination against aliens. This Court expressly repudiated the doctrine in Graham v. Richardson, supra at 374-76.

19/ The absence of that presumption is particularly appropriate with respect to statutes classifying on no basis

The discrimination imposed on aliens, however, does not reflect a mere defeat suffered after full participation by aliens in the political process. Aliens simply have no participatory role. When the group that is disadvantaged by the legislation has been excluded from the political process itself, there is more substance to the concern that disadvantaging the excluded class was in fact the very purpose of the legislation rather than just an "unintended by-product" of legislation designed to serve

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> but alienage. Given the substantial disabilities imposed on aliens, the long history of discrimination they have suffered, and the irrationality of excluding aliens from some occupations but not others, the Court should view with appropriate skepticism a State's claim that its classification was a reasonable response to whatever interest it is now asserting or the result of the "give and take" of a representative political process. The strict scrutiny test--without any presumption of constitutionality -- is an appropriate means to test that skepticism. See Rosberg, "The Protection of Aliens from Discriminatory Treatment by the National Government," 1977 Supreme Court Review 275.

some other legitimate state purpose.20/ That classification, as well as the political process that produced it, is "suspect" and should be subjected to strict judicial scrutiny. Lesser standards of review are inappropriate because they are based on assumptions that have no relevance to a system where the disadvantaged--aliens--because they cannot vote are excluded from participation in the political process.21/

In sum, strict scrutiny provides aliens their only true protection against the invidious discrimination to which they have been subjected. At the same time, however, it affords the State the opportunity to demonstrate that a classification based on alienage is the

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20/ Rosberg, supra note 19, at 301.

21/ See Skafte v. Rorex, 553 P.2d 830 (Colo. 1976), appeal dismissed, 430 U.S. 961 (1977). But see Rosberg, "Aliens and Equal Protection: Why Not the Right to Vote?," 75 Mich. L. Rev. 1092 (1977). The fact that aliens "have no direct voice in the political process" and, as a consequence have been denied assistance "essential to life itself" was key to concluding that discrimination on the basis of alienage requires "heightened judicial solicitude." Foley v. Connelie, supra at 1070.

only way, or at least the most precise way, of achieving a substnatial interest. But when a classification based on alienage does not fit the interest asserted by the State, either because it is overinclusive or underinclusive, the Court must inquire further to ensure that the State is not acting on the basis of inaccurate stereotypes or that the real purpose of the classification is not something different from that asserted. 22/

22/ "[T]he mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).

> This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its legislative history demonstrates that the asserted purpose could not have been a goal of the legislation.

Id., citing Eisenstadt v. Baird, 405 U.S. 438 (1972). Under a rational basis standard of review, the Court's scrutiny both of legislative purpose and legislative means has been far less demanding. Thus, for example, the Court has been willing to take

B. Nyquist v. Mauclet Requires That Strict Judicial Scrutiny Be Applied To The Classification At Issue

Under the statutory scheme at issue in this case, aliens who are under no legal bar to obtaining citizenship can declare their intention to become citizens (and then become citizens in due course) and can obtain permanent teaching certificates from the State of New York. This opportunity to remove oneself from the statutory class, however, does not warrant a lesser standard of judicial review of the disadvantages imposed on aliens who choose to retain their foreign citizenship.

In Nyquist v. Mauclet, 432 U.S. 1 (1977), permanent resident aliens

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> the government's explanation of legislative purpose "at face value" and has sustained a consequent statutory classification--even though both over- and under-inclusive--because it was "reasonably related" to that purpose and served administrative convenience by avoiding specific case-by-case determinations. Mathews v. Lucas, 427 U.S. 495, 507-09 (1976). Neither the "face value" acceptance nor the administrative convenience justifications survive stricter standards of review.

challenged a New York Education Law which barred resident aliens from receiving certain educational benefits unless they declared their intention to become United States citizens.23/ There the Court rejected the State's argument that the statutory classification should not be subjected to strict judicial scrutiny because it did "not impose a classification based on alienage," but distinguished between classes of aliens rather than between citizens and aliens. Id. at 7-9.

The Court held that the two key elements in determining whether strict judicial scrutiny would be required of a state statutory classification based on alienage were (1) whether the statute is "directed at aliens" and (2) whether "only aliens are harmed by it."

> The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class. [Id. at 9.]

The fact that aliens could "voluntarily" withdraw from the disadvantaged class was of no importance. 432 U.S. at 9 n.11.24/

23/ At issue was N.Y. Education Law § 661(3) (McKinney Supp. 1976).

24/ Similar statutory schemes that discriminated among classes of aliens were invalidated in Graham v. Richardson, supra, and Takahashi v. Fish & Game Commission, supra. See also Yick Wo v. Hopkins, supra (discriminatory enforcement against only Chinese.)

In the instant case, an identical statutory scheme is at issue. Permanent resident aliens who wish to become permanently certified public school teachers can voluntarily withdraw from the disadvantaged class by declaring their intention to become United States citizens. But, just as in Nyquist v. Mauclet, this does not change the fact that the statute at issue is (1) directed only at aliens and that (2) only aliens are harmed by it. The statute must, therefore, be subjected to strict judicial scrutiny.25/

C. Because Public School Teachers Do Not Hold Policy Making Positions, The Classification At Issue Must Be Subjected To Strict Judicial Scrutiny

In Sugarman v. Dougall, 413 U.S. 634 (1973), the Court held that unless the position from which the state barred aliens was a policy making one which requires the performance of "functions

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25/ The precedential importance of the Nyquist v. Mauclet strict scrutiny standard of review should be given proper deference. See generally Monell v. Department of Social Services of the City of New York, 98 S. Ct. 2018, 2048-50 (1978) (Rehnquist, J. dissenting).

that go to the heart of representative government," the State could not constitutionally require citizenship as a precondition to public employment. Id. at 647. The Court did not articulate what criteria it was using to determine what constitutes such a policy making position. Nor did the Court articulate what criteria it was applying in Foley v. Connelie, 98 S. Ct. 1067 (1978), when it held that police officers were such policy makers.26/ There are, however, objective criteria which can be applied when a state asserts that the position from which it has barred aliens is a policy making one. Because of the history of discrimination against aliens and the importance of the interests at stake, the Court should carefully consider whether these criteria are satisfied. Sugarman v. Dougall, supra at 642-43.

26/ In Foley, Chief Justice Burger concluded that "[the Court's] scrutiny [would] not be so demanding where we deal with matters firmly within a State's constitutional prerogatives." 98 S. Ct. at 1070, quoting Sugarman v. Dougall, supra at 648. The Chief Justice did not discuss, however, what criteria would be applied in ascertaining whether a "matter of State constitutional prerogative" was in fact involved. See also Foley v. Connelie, supra at 1074 n. 1 (Marshall, J., dissenting).

1. There Are Objective Criteria Which Determine Whether a Position Is a Policy Making One

Sugarman v. Dougall, supra, held that citizenship could not constitutionally be required for employment in all State civil service jobs.27/ The Court added a caveat, however, that some civil service jobs could be conditioned on citizenship:

> [Citizenship could be required of] persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government. [413 U.S. at 647.]

27/ 413 U.S. at 647:

> [A] flat ban on the employment of aliens in positions that have little, if any, relation to a State's legitimate interest, cannot withstand scrutiny under the Fourteenth Amendment.

Thus, a State is required to show that the job at issue is an "important nonelective executive, legislative [or] judicial position." Factors relevant to the analysis include how that position is classified vis-a-vis others in the State's civil service, how applicants are recruited and hired, what has been the historical conception of the position, and whether the position is vested with sovereign authority.28/

But in order to establish that the job is in fact "important" so as to bring into play the Sugarman caveat, the State must show that each and every person holding the nonelective position participates "directly in the formulation, execution, or review of broad public policy." Sugarman v. Dougall, supra at 647. For example, a Deputy Clerk of Court may be classified as an important nonelective judicial position; the position might, in terms of judicial

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28/ As Appellees' Brief establishes, under the New York scheme teachers in the overall public employment system are not officers but employees. See, e.g., Corsall v. Gover, 10 Misc. 2d 664, 667, 174 N.Y.S.2d 62, 66-67 (1958); 1963 Op. N.Y. Atty. Gen. 196. The State should be held in this forum to the statutory scheme it has established in its civil service.

management, be "important"; it usually is "nonelective"; and, assuming all government positions must fall within one of the three branches, it is more judicial than legislative or executive. But the State must show in addition that the employment entails a direct participatory role in the formulation, execution, or review of broad public policy, a test which is considerably more difficult to meet.29/

29/ The difficulty of showing both "importance" and the participatory role is graphically illustrated in Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977), vacated, 98 S. C.. 2229 (1978). Three lawfully admitted permanent resident aliens challenged the constitutionality of a California statute, California Government Code §1031(a), that required citizenship as a precondition to holding any governmental position "declared by law to be a peace officer or which has the powers of a peace officer." 427 F. Supp. at 159. The three plaintiffs had been denied appointment as deputy probation officers -- defined under the statute as "peace officers" -- because of their alienage. The three-judge district court, relying on Sugarman, invalidated the statute; this Court vacated the judgment and remanded the case for further consideration in light of Foley v. Connelie. But even

An additional criterion further narrows the Sugarman test: the State must be required to show that the direct participation is related to broad public policy going "to the heart of representative government." Id. In other phrasings, the Court has suggested that this criterion is relevant to the "establishment and operation of [the State's] own government," "helps to define

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> if, under Foley, "peace officers" are important nonelective executive positions for which citizenship constitutionally can be required, not all of the "peace officers" under the California statutory scheme participate "directly in the formulation, execution, or review of broad public policy." Sugarman v. Dougall, supra at 647. For under the California classification scheme, "peace officers or [those having] the powers of a peace officer" include voluntary fire wardens, racetrack investigators of the California Horse Racing Board, sextons and superintendents of cemeteries, inspectors of the Board of Dental Examiners, and inspectors of the Bureau of Furniture and Bedding Inspection. It strains credulity to argue that these positions involve the formulation, execution, or review of broad public policy contemplated by Sugarman.

the State's political community," and is directly related to the State's "democratic political institutions."30/

The basic principle of Foley v. Connelie, supra, is that citizens have a right to be governed by citizens. This principle apparently arises from the modern political theory that it is by virtue of citizenship that a person becomes a party to the social contract, and thereby acquires the right and assumes the duty to participate directly in the processes of government.31/ Thus, although the Bill of Rights and the Fourteenth Amendment recognize that all

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30/ Merely asserting that "broad public policy" is involved would not automatically establish that that policy concerns the operation of government. For example, it might be a State's "broad public policy" to have good medical care available for all the State's residents. That, however, does not mean that medical care goes to the "heart of representative government". Thus, the State could not justify a citizenship requirement for publicly employed physicians. See Surmeli v. State of New York, 412 F. Supp. 394 (S.D.N.Y.), aff'd without opinion, 556 F.2d 560 (2d Cir. 1976), cert. denied, 98 S. Ct. 2230 (1978)

31/ A. Bickel, The Morality of Consent 34 (1975).

persons enjoy a natural right to "equal protection of the laws," and to be secure from governmental deprivation of their "life, liberty or property" without due process of law, only citizens enjoy the right to exercise sovereign authority: The authority to vote, that is, to participate in choosing who shall make the laws which govern us all; the authority to legislate, that is, to formulate the policies which all persons are compelled by force of law, to obey; the power to enforce such laws, that is, to exercise the authority, which only the State enjoys, to compel by means of force compliance with such laws; and the power to adjudicate, that is, to determine whether the laws which bind us all have been violated, and to impose penalties for such violations.

2. The Position of Public School Teacher Is Not Vested With Sovereign Authority and Does Not Meet the Sugarman Criteria

The State has not shown, and indeed cannot show, that public school teachers hold the type of policy making positions contemplated by Sugarman for which citizenship constitutionally could be required. Teaching is one of the "common occupations of the community."

Truax v. Raich, supra at 44.32/ It is unrealistic to suggest that each public school teacher "directly participates in the formulation, execution, or review of broad public policy." Nor does the public school teacher's function or authority go to the "heart of representative government."

a. Public school teachers do not directly participate in the formulation, execution, or review of broad public policy.

Public school teachers are hired by the State to teach a State-prescribed course of study in State-prescribed class situations.33/ While each public school

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32/ Statistics support the fact that teaching is a common occupation in the community. It is the third largest occupation in the State, and even when limited to public school teachers (excluding private, college, and university teachers), is the largest public sector occupation. See Brief of Appellees.

33/ The non-high school curriculum includes courses in arithmetic, reading, spelling, writing, English, geography, United States history, civics, hygiene, physical training, New York history, and science. N.Y. Education Law § 3204. The high school curriculum includes a similar listing: English, physical

teacher of necessity brings his or her background, experience, and training to the classroom--factors which are taken into account in individualized certification proceedings--the public school teacher has no role in formulating what courses ought to be taught to his or her students.34/ Nor does the public school teacher review the decisions made by policy-making individuals to determine whether those decisions meet the teacher's own curricula standards. Although public school teachers may, to some extent, execute broad public policies, in so doing they do not perform a policy function.35/ Teachers simply do not possess

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> education, American history, and civics and government. N.Y. Education Law § 3204. In addition, a wide variety of special courses are required. N.Y. Education Law § 801 et seq. See Brief of Appellants at 7-10.

34/ The curriculum has been subject to state standards from the time that public education was first made available in New York. See Brief for Appellant at 9 & n. **.

35/ See Foley v. Connelie, supra at 1075 (Marshall, J., dissenting):

> [T]he phrase "execution of broad public policy" in Sugarman cannot be read to mean simply

executive discretion which is in any way similar to that possessed by police officers.36/

Public school teachers are far more like lawyers than police officers. Neither public school teachers nor lawyers have responsibilities that "involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens." In re Griffiths, supra at 724. Neither position "offers meaningful opportunities adversely to affect the interest of the United States." Id. Although both positions involve responsibilities to other parties--the teacher to State and students, the lawyer

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> the carrying out of government programs, but rather must be interpreted to include responsibility for actually setting government policy pursuant to a delegation of substantial authority from the legislature.

36/ The discretion afforded police officers was key to the Court's holding in Foley v. Connelie, supra at 1072:

> A policeman vested with the plenary discretionary powers we have described is not to be equated with a private person engaged in routine public employment.

to Court and clients--there is nothing in the concept of citizenship that has any relevance in determining who may carry out those responsibilities. Id. Even if there were some relevance, public school teachers and lawyers "are subject to continuing scrutiny by the organized bar [or for teachers, principals] and the courts [or for teachers, school districts]." Id. at 727. Finally, the sanctions of lost bar membership or withdrawn teaching certification are certainly severe enough to "vindicat[e the State's] undoubted interest in high professional standards." Id.

New York State recognizes that its school policy-making functions are divorced from the public school teacher's role.37/ The policy-making function provides for participation by alien parents. Under the State's public school system, registered voters and, to the extent not therein included, the students' parents, carry out policy formulation and review. Public school teachers do not

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37/ Brief for Appellants at 8-9: "The [school] districts have been, and continue to be, responsible for administration, . . . curriculum development . . . and teacher selection . . . under limited statewide standards." By statute community school boards hire and fire teachers, choose textbooks, and "manage and operate the schools." N. Y. Education Law §2590-e.

perform those functions. Community school boards are elected by registered voters and parents notwithstanding the fact that the parents may not be United States citizens.38/ The element of citizenship simply is irrelevant: the concern of the legislature is that "the right to vote for the community school boards which would govern the affairs of the schools" belong to those most directly involved--a category including both citizens and aliens.39/ Those hired to implement school board policies are not direct participants in the formulation, execution, or review of the board's policies. Thus, those employees--public school teachers--cannot be considered Sugarman policy-makers.

b. Public school teachers do not perform a function that goes to the heart of representative government.

Even assuming that all public school teachers hold important nonelective executive positions and that each public school teacher directly participates in the formulation, execution, and review of the State's broad public policy, teaching does not go to the "heart of

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38/ Education Law §§ 2590-c(3), (4).

39/ Letter from Michael B. Rosen, App. at 27-28. See also Special Circular, App. at 29-32.

representative government." Nor does teaching in any way relate to the State's concern for its "political community" or for the establishment and operation of its government.

The police function, on the other hand, has been viewed as reaching to the heart of representative government because of the very nature of the authority vested in the police. Each police officer is clothed with the authority of the State, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 394-95 (1971), and each can wield that authority in exercising "an almost infinite variety of discretionary powers." Foley v. Connelie, supra at 1071. In representing the state's authority and exercising "plenary discretionary powers," police

> affect[] members of the public significantly and often in the most sensitive areas of daily life. [Id. at 1071.]

It is this confluence of state authority and plenary discretion that supports the Court's holding that the police function is related to the State's concern for its political community and to the concept of representative government.

Two other areas where citizenship constitutionally has been required have the same confluence of authority and discretion. Voting--the quintessential political act--is the power to choose

those with authority to legislate. Moreover, it is by its very nature a discretionary act. Thus, voting, that is, "participation in the government policy-making process," constitutionally can be limited to citizens. Skafte v. Rorex, 553 P.2d 830, 833 (Colo. 1976), appeal dismissed, 430 U.S. 961 (1977). The same conclusion applies to jurors. Jurors embody the authority of the state criminal justice system; it is the jurors who are afforded almost unreviewable discretion in making "the ultimate factual decisions on issues of personal liberty and property rights under our system of justice." Perkins v. Smith, 370 F. Supp. 134, 136 (D. Md. 1974), aff'd mem., 426 U.S. 913 (1976). Thus, service on a jury--"one of the institutions at the heart of our system of government"--constitutionally can be limited to citizens. Id.

Because teachers do not exercise the same broad State authority as police, and because teachers have no role--as voters do--in deciding who will exercise the authority of the State, there is no basis for concluding that teaching is a function going to the heart of representative government. The confluence of authority and plenary discretion present with police, voters, and jurors is not present with teachers. Teachers do not exercise sovereign authority.

Because the State cannot establish that public school teachers hold policy making positions or exercise sovereign authority, the alienage classification

embodied in New York Education Law § 3001(3) should be subjected to strict judicial scrutiny.

II. A STATE CLASSIFICATION THAT BARS ALIENS FROM PERMANENT CERTIFICATION AS PUBLIC SCHOOL TEACHERS VIOLATES EQUAL PROTECTION

New York has not established that it has a compelling state interest in barring non-declarant aliens from permanent certification as public school teachers. But even if the state's asserted interests are substantial, it has not shown that the alienage classification is the least drastic means for achieving those interests. In addition, the classification is seriously overinclusive and underinclusive. As a result, it is not appropriately tailored to achieving the State's interests. The classification also establishes an irrebuttable presumption that has no basis in logic or fact. For each of these reasons, the statute should be invalidated.

A. The Alienage Classification Embodied In N. Y. Education Law § 3001(3) Cannot Pass Strict Judicial Scrutiny.

The State asserts that it has a compelling interest in assuring that its public school teachers are personally committed to principles of American democracy, are loyal to the United States, and are "proper" role models for their students. Even assuming that the asserted

interest is compelling, the State also is required to establish that the means chosen to achieve its ends are the least drastic available. In addition, the State must show that the method it has chosen is appropriately tailored to achieve the compelling State interests. The State has not, and cannot, meet those requirements with respect to the alienage classification at issue.

1. The State Has Not Shown That the Alienage Classification in Section 3001(3) Is the Least Drastic Means of Achieving the Asserted State Interest

The State is required to achieve the interests it asserts are compelling by the least drastic means available,40/ and least drastic means certainly is not class legislation. Class legislation is particularly inappropriate here, where two readily accessible alternative methods are

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40/ "Statutes affecting constitutional rights must be drawn with 'precision,' ... and must be 'tailored' to serve their legitimate objectives.... And if there are other, reasonable ways to achieve those goals with a lessor burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" Dunn v. Blumstein, supra at 343 (citations omitted).

available which would pose no additional administrative burdens and would more effectively reach the State's concerns.

a. The individualized teacher certification process achieves the State's objectives

New York State certifies every public school teacher before he or she is eligible to teach in the public schools.[41/] It would pose no additional burdens on the State to use this certification process to achieve its stated objectives. The certification process could identify both alien and citizen teachers not meeting the personal commitment and loyalty requirements, and would permit certification of aliens who did meet the requirements -- such as Appellees in this case. The State should be required to implement this less drastic means of achieving its stated objectives.

b. The State's present oath requirement is a more appropriate means of achieving the State's ends

The State's present public school teacher oath requirement also is a more appropriate means of achieving the State's objectives. Every public school teacher in New York--citizen, declarant alien, and provisionally-certified alien--must take

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41/ See N.Y. Education Laws §§ 3004, 3006.

the following oath before being certified to teach in the public schools:

> I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of . . . (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned. [N.Y. Education Law § 3002.]

The State's purpose in requiring that oath achieves all the goals offered in the State's brief. This oath requirement--designed for the very purpose the State asserts its alienage classification serves--is a more appropriate means of achieving the State's interests. Appellees have, in fact, said that they are willing to subscribe to this oath if it is required for certification. App. at 25.

There is no problem with "aliens" taking this oath. In the first place, temporarily and provisionally certified aliens (those who are statutorily unable to become permanent resident aliens or citizens) take an identical oath and

teach.42/ Moreover, declarant aliens take the same oath in order to be certified and to teach. The State's argument appears to rest on the proposition that aliens voluntarily choosing not to become citizens would -- class-wide -- have difficulty taking this oath in good conscience. That argument was definitively laid to rest in In re Griffiths, supra:

> We find no merit in the contention that only citizens can in good conscience take an oath to support the Constitution . . . . If aliens can take [an oath when inducted into the Armed Services] when the Nation is making use of their services in the national defense, resident alien applicants for admission to the bar surely cannot be precluded, as a class, from taking an oath to support the Constitution on the theory that they are unable to take the oath in good faith.43/

42/ N.Y. Education Laws § 3001-a; 8 NYCRR § 80.2(i)(2).

43/ 413 U.S. at 726 n. 18 (emphasis supplied). Griffiths voluntarily chose to retain her Dutch citizenship. Id. at 718 n.1.

The oath requirement, therefore, is a more appropriate means, and one already in use by the State, for assuring that each teacher applicant has the requisite level of personal commitment and loyalty.

2. The Alienage Classification in Section 3001(3) Is Seriously Over-Inclusive

Even if the State were permitted to use an alienage classification instead of more appropriately tailored ways of achieving its stated purposes, the alienage classification it has chosen is seriously over-inclusive. The State is achieving "too much" by the classification. It asserts that it is attempting to staff its public schools with teachers who are both personally committed to principles of American democracy and who are loyal to the United States. Yet non-declarant aliens are, under the classification, excluded from all teaching positions: alien teachers who have a special talent in the arts would be excluded under the classification scheme even though the State has not shown that its asserted interests have any relevance whatsoever to the teaching of art.44/ Similarly, the bar includes all

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44/ Nor would any individual aliens, including Appellees, be allowed to prove that they have the requisite personal commitment and loyalty

the science, all the language, and all the physical education courses included in the state-mandated curriculum. The alienage bar is too absolute and over-inclusive to survive the appropriate equal protection analysis announced in Griffiths: "[T]he possibility that some resident aliens are unsuited to [some teaching positions] [cannot] be a justification for a wholesale ban."45/

3. The Alienage Classification in Section 3001(3) Is Seriously Under-Inclusive

In addition to including in its alien-teacher ban some teaching positions having no relevance to the State's

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because the statute imposes an irrebuttable presumption that aliens do not have those attributes. See discussion in Part II-C infra.

45/ 413 U.S. at 725. This same analysis was critical in Sugarman and reaffirmed in Foley: Even if the State is permitted to use an alienage classification to achieve its end, the State may not "accomplish this end with a citizenship restriction that 'sweeps indiscriminately' . . . without regard for the differences in the positions involved." Foley v. Connelie, supra at 1071 n.5, quoting Sugarman v. Dougall, supra at 643.

asserted personal commitment and loyalty principles, the State excludes some positions where its asserted interests might have relevance. The State mandates the curriculum required of all New York students subject to the State's compulsory education law.46/ Thus, private schools (both secular and non-secular) must teach certain fundamental courses, among them those on American history and government. If the State's "compelling" interests are in ensuring that all students required to attend school be exposed to principles of American democracy from teachers who have a personal commitment to those principles, then it is irrational for the State to apply its alienage bar only to public school teachers. Private school students must be taught those principles yet their teachers can be non-declarant aliens despite the State's assertion that non-declarant aliens are incapable of teaching those principles. Thus, the State's classification scheme is seriously under-inclusive.

46/ Instruction in the private schools must be "substantially equivalent" to that provided in the public schools. N.Y. Education Law § 3204(2). Thus, United States history, civics, and the history of New York are required courses in the private elementary schools; American history and civics are required in the private high schools. N.Y. Education Laws §§ 3204(2), (3)(a)(1).

Under-inclusiveness also is apparent in the regulatory scheme adopted by the State Commissioner on Education pursuant to the 1967 amendment referred to in the challenged statute.47/ While

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47/ There are in fact no standards to guide the Commissioner in the exercise of his discretion under the statute. We know only that the State in 1967 took itself out of the business of barring aliens from being permanently certified as public school teachers, but, at the same time, delegated unlimited discretion to the Commissioner of Education to adopt alienage restrictions. Pursuant to that authority, the Commissioner promulgated Regulation 80.2(i) which permits two classes of alien teachers to be provisionally certified: those possessing unique skills not readily available among citizen teachers and those under a statutory bar to becoming citizens. There is nothing in the statute that prevents the Commissioner from removing those two "exemptions" or adding new "exemptions" tomorrow. For example, the statute would not prevent the Commissioner from permitting the certification of permanent resident aliens of European nationality but excluding permanent resident aliens from Asia; nor is there anything in the statute that

the State is asserting here that citizenship or an intention to become a citizen is the most critical factor in determining whether aliens can teach in the public schools, the regulation promulgated by the Commissioner permits aliens who are statutorily barred from becoming citizens to teach in the public schools.48/ It is irrational to assert

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> prevents the Commissioner from certifying all white aliens to the exclusion of all black aliens. Such standardless discretion violates due process and increases the chances that certain aliens will be discriminated against because of race, religion, or ethnic origin.
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> Unbridled discretion in the hands of government officials has frequently been held to violate the Constitution. See, e.g., Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975); Goldberg v. Kelly, 397 U.S. 254 (1970); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969). The same reasoning applies in the instant case, and the statute at issue should be invalidated.

48/ 8 NYCRR § 80.2(i). At issue here is section (2) of the regulation which permits certification of aliens who need not take a stand on whether they would, if asked, voluntarily give up

that alienage is a highly relevant classification for achieving the State's purposes when that very classification scheme does not take into account (under-includes) persons who may be least likely to be committed to or loyal to American democratic principles. This under-inclusiveness and irrationality warrant invalidating the alienage classification embodied in N. Y. Education Law § 3001(3).

B. The Alienage Classification Cannot Pass Lesser Standards of Review Because It Is Based On Class-Wide Stereotypes Having No Basis In Logic or Fact.

Because the alienage classification established by the New York statute in no way fits the asserted interests of the State, it is reasonable to assume that interests other than those now being asserted as "compelling" are in

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their foreign citizenship; they are statutorily barred from becoming United States citizens, and the State does not require more information, such as whether the alien would declare an intention if permitted, before certifying this class of aliens. Moreover, that class also takes the public school teacher's oath, N.Y. Education Law § 3002, a seeming contradiction in the State's argument that an oath requirement would not serve the State's purposes.

fact involved. One such interest might be the "special public interest" doctrine--reserving public employment to citizens alone. Yet this reason clearly is unconstitutional under Sugarman v. Dougall, supra. A second possible interest the classification serves is encouraging permanent resident aliens to become citizens--"encouragement" that takes the form of denying those aliens the right to work in their chosen occupations. This interest is reserved to the federal government alone and impermissible if advanced by the State. Nyquist v. Mauclet, supra at 10. See Part III infra.

A third conceivable interest rests on an unexplained assumption that there is a "difference" between aliens and citizens, a difference arising out of the very fact of citizenship papers and a difference which can appropriately be the basis of State legislation. Yet the most often stated "difference" is but a circular argument that aliens are "different" because they are not United States citizens. That argument fails because discrimination against aliens, if premised on that "difference," becomes but an end in itself.49/ Something more than

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49/ See, e.g., Truax v. Raich, supra at 41-42 ("The discrimination against aliens in the wide range of employments to which the [Arizona] act relates is made an end in itself, and thus the authority to deny to aliens, upon the mere fact of their

this conclusory assertion is required. The justification might rest on historical "fears" or on perceived misconceptions of a "typical" alien, newly arrived and having neither knowledge of nor allegiance to American democratic principles. Neither should permit the State to continue a class-wide discrimination against aliens which impairs their "ability to earn a livelihood and engage in licensed professions." Foley v. Connelie, supra at 1071.

Three key stereotypes run through the cases involving discrimination against aliens: that aliens have less of a stake or interest in local community affairs and concerns than citizens have; that aliens as a class lack knowledge of and appreciation for, traditional American democratic values; and that aliens as a class lack loyalty to the United States and to its political and social institutions. Certain of these erroneous stereotypes are mere relics of the past, but others reflect prevailing misperceptions about an identifiable segment of the country's residents.50/

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> alienage, the right to obtain support in the ordinary fields of labor, is necessarily involved.").

50/ Legislation founded on sex-based stereotypes has recently been subjected to careful judicial review

Neither that history nor these misperceptions warrant continued discrimination against aliens. In defending the classification at issue here, the State sanctions these demeaning stereotypes.51/

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> to assure that the classification created by the stereotype did, in fact, bear some relation to a valid government purpose and was not merely a relic of the past:
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> > [The classification] is forbidden by the Constitution, at least when supported by no more substantial justification than "archaic and overbroad" generalizations . . . or "old notions" . . . that are more consistent with "the role-typing society has long imposed" . . . than with contemporary reality.
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> Califano v. Goldfarb, 430 U.S. 199, 206-07 (1977) (Brennan, J.). See also Weinberger v. Wiesenfeld, supra; Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). Similar careful judicial review of the stereotypes about aliens is warranted in order to see if they bear any relation to valid government purposes and are not merely "archaic and overbroad" relics of the past.

51/ The classification is not only invidious and irrational, but also tends to undermine New York's

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> interests in promoting respect for democratic values, in fostering a sense of community, in instilling public confidence in its educational system, and in providing federally-required bilingual educational opportunities to its public school students. Classifications based on alienage carry with them a badge of inferiorty, stigmatizing members of the disadvantaged class as inherently less worthy than members of the advantaged class. N. Y. Education Law § 3001(3), as the State admits, does indeed assume that non-declarant aliens are "inferior." That assumption offends the fundamental democratic principle of the dignity of the individual. In addition, by its own terms, the statue singles out for discriminatory treatment aliens as a class. The explicitness of that discrimination can only add to the stigma and injury. Thus the statute tends to enhance rather than diminish racial and ethnic prejudice by legitimizing the invidious stereotypes upon which it is based. Further, by denying aliens equal access to public school teaching jobs, the statute tends to undermine public confidence in the public education system. The Report of the Mayor's Advisory Panel on Decentralization of New York City

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> Schools (1967) [Bundy Report] concluded:
>
> > There is wide agreement among qualified observers that the ethnic and nationality pattern of the professional staff has been and still is a reason for much of the disaffection of large segments of the community with the schools. [Bundy Report at 21.]

Finally, N. Y. Education Law § 3001(3) tends to impede the State's efforts to fulfill its federal obligation to provide bilingual educational opportunities for its public school students. See generally Lau v. Nichols, 414 U.S. 563 (1974); ASPIRA of New York, Inc. v. Board of Education of the City of New York, 394 F. Supp. 1161 (S.D.N.Y. 1975); 20 U.S.C. §§ 1703(f), 2000d; 45 C.F.R. §§ 80.3(b)(1), 89.3(b)(2); 35 Fed. Reg. 11575 (1970). Under the terms of the consent decree entered into in ASPIRA of New York, supra, the school district must provide an educational program including "intensive training in English language skills, instruction in substantive courses in Spanish, and reinforcement of Spanish language skills." 394 F. Supp. at 1162. Despite these mandates, a high percentage of school children requiring bilingual or specialized education receive no such

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training. In the State's public schools during the 1976-77 school year, the last year for which statistics are available, 132,174 children were eligible for the bilingual reading programs, 27,414 were eligible for bilingual mathematics, and 28,449 were eligible for English as a Second Language. Of these eligible students, 29,298 participated in the reading program; 8,676 in mathematics; and 13,803 in English as a Second Language. State Department of Education, Bilingual Programs in New York State: Summary of Status of Bilingual Education (1978).

There is a New York-wide and nation-wide shortage of teachers of bilingual education for non- and limited-English speaking children. Among the ranks of permanent resident aliens are many of the bilingual, bicultural people needed to implement required programs and to make them successful. New York State, however, excludes from the workforce the very people who could best teach these school children--teachers who are fluent in English and the language of the student and teachers who have knowledge of the student's culture. Given this concern for the educational needs of New York's

1. Aliens Have as Great a Stake And Interest In Local Community Affairs And Concerns as Citizens

The test of whether one has a stake or interest in any given community depends on one's residency in the community, not one's national citizenship. Permanent resident aliens are permitted by the federal government to enter the United States for the express purpose of making this country their home.52/This

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school children, the alienage discrimination in Section 3001(3) seems particularly irrational.

52/ See 8 U.S.C. § 1101(a)(20); Saxbe v. Bustos, 419 U.S. 65, 68 (1974). Nonresident aliens, on the other hand, are permitted to remain in this country for specific periods of time -- times determined by the federal government before the nonresident alien arrives in the United States. There is nothing inherently contradictory about "nonresident" aliens actually being "residents" of the community because the federally permitted stay is in most cases longer than that normally associated with residency. See Elkins v. Moreno, 98 S. Ct. 1338 (1978). However, the Court need not address this issue because Appellees here are permanent resident aliens.

Court already has acknowledged the contribution aliens make to their community:

> Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces and contribute in myriad other ways to our society. It is appropriate that a State bear a heavy burden when it deprives them of employment opportunities. 53/

To conclude that aliens have less of a stake or interest in their community because of their foreign citizenship alone ignores reality.

New York State specifically recognizes that aliens have a stake in running the public school system in their community. Although denied the opportunity to vote generally, alien parents of public school students may vote

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53/ In re Griffiths, supra at 721. Accord, Graham v. Richardson supra at 376; Rosberg, supra note 21, at 1112.

in community school board elections without regard to citizenship.54/

Nor is there any indication that permanent resident aliens are more transitory than citizens, and, as a consequence, less likely to have a stake or interest in any given community. Even if transience is of legitimate concern to the state or local government,55/ the legislative remedy must be directed narrowly toward the evil--transience--rather than to an unrelated concept--alienage. Appropriate residency requirements could establish sufficient "stake or interest" in the community.

2. Aliens as a Class Do Not Lack Knowledge Of, And Appreciation For, Democratic Values

Although individual aliens, like individual citizens, may lack substantial knowledge about traditional American

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54/ N.Y. Education Law §§ 2590-c(3), (4).

55/ The constitutional right to travel, a right granted to citizens and aliens, could be seriously infringed upon by State or local legislation attempting to establish the "bona fides" of residency. See Dunn v. Blumstein, supra at 338-42; Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969). See also Hicklin v. Orbeck, 98 S. Ct. 2482 (1978).

democratic principles, there is no basis for the State's assertion that aliens, as a class, lack such knowledge. Nor is there reason to assume that aliens, as a class, lack an appreciation of democratic values. Aliens, who have made a deliberate choice to leave their "home" country for a new life in the United States, might have a greater appreciation for their new "home" than those who are born here or receive their American citizenship through their parents.

The "lack of knowledge" stereotype is particularly irrational when applied to Appellees. Both are well-educated teachers. As teachers, both are "members of the professions" for whom Congress has provided an immigration preference.56/

56/ 8 U.S.C. §.1153(a)(3). The Immigration and Nationality Act also provides that an alien having a residence in a foreign country which he or she does not intend to abandon may teach in the United States as a participant in a program appropriately designated by the Secretary of State. 8 U.S.C. § 1101(a)(15)(J). In addition, non-immigrant status may be conferred on an alien having a residence in a foreign country which he or she does not intend to abandon if the alien is of distinguished merit and ability, would be a temporary worker in a job for which qualified American workers are not available, or is a

Moreover, the State has provided these Appellees with the graduate education they want to use in the State's behalf. To prohibit them from so doing on the basis of a stereotypic relic of the past is the height of irrationality.

If the State's concern is for knowledge of democratic values, the most appropriate means of meeting that concern is to test for that knowledge, not to assume that one class of persons has the knowledge and another does not. As this Court has stated:

> If the job-related quality that the appellants identify is bona fide, their purpose could be achieved by adopting and validating a test for applicants that measures [the quality] directly. Such a test, fairly administered, would . . . be one

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trainee. 8 U.S.C. § 1101(a)(15)(H). In 1975, 5,631 alien teachers were admitted under non-immigrant classifications and 7,767 were admitted on immigrant visas. Immigration and Naturalization Service, Annual Report: 1975, at 45-46, 71-72. Even more teachers were admitted in 1976: 8,512 as non-immigrants and 8,146 as immigrants. Immigration and Naturalization Service, Annual Report: 1976, at 57-58, 102-03.

> that "measure[s] the person for the job and not the person in the abstract."57/

Such testing would permit the knowledgeable person--citizen and alien--to demonstrate that he or she has the capability to perform the tasks required.58/

3. Aliens As A Class Do Not Lack Loyalty To The United States Or To Its Political and Social Institutions

Prior to their admission to the United States, aliens are carefully screened in ways clearly not permitted with respect to United States citizens who either live in this country or who move here after being born abroad of American parents. Specific statutory restrictions

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57/ Dothard v. Rawlinson, 433 U.S. 321, 332 (1977), quoting Griggs v. Duke Power Co., 401 U.S. 424, 436 (1971).

58/ A testing requirement of course could not be imposed if not rationally related to the position for which the test is required. Such an unrelated requirement, falling as it might on identifiable classes of citizens and aliens, would run afoul of the equal protection clause under other case law. See Washington v. Davis, 426 U.S. 229 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

are applied against aliens seeking admission who are, or have been, anarchists or communists, or who advocate or teach the overthrow by force of the government of the United States. 8 U.S.C. § 1182(a)(28). In addition, admission is forbidden those aliens whom the consular officer or the Attorney General

> knows or has reasonable ground to believe probably would, after entry ... engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security .... [8 U.S.C. § 1182(a)(29).]

Moreover, aliens -- and citizens -- are subject to arrest for any violation of the espionage or sabotage laws.59/ Finally, the alien is always subject to the dire consequence of deportation.

The United States Government has demonstrated little concern about alien

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59/ It has been persuasively argued that aliens are also subject to the treason laws for while in this country they owe allegiance to it and are not free to give "aid and comfort" to an enemy of the United States. See Rosberg, supra note 21, at 1126.

loyalty for it has subjected alien men to the draft.60/ Surely if concern for

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60/ During World War II, every male citizen and every other male person "residing in the United States" were liable for military training and service. Selective Training and Service Act Amendment of 1941, ch. 602, § 2, 55 Stat. 844. Citizens of neutral countries could be relieved of this liability by applying for relief, but an application so filed would have the consequence of permanently barring the applicant from becoming a United States citizen. Id. There was a dramatic change of policy in the 1951 Universal Military Training and Service Act, ch. 144, §1(d), 65 Stat. 75. No relief was provided; the draft applied even-handedly to United States citizens and aliens admitted for permanent residence. Because the test was "admitted for permanent residence," there was not even a minimal residency requirement placed on alien-inductees. The stereotypic "alien right off the boat" was draftable so long as he arrived in this country as an alien "admitted for permanent residence." See generally United States v. Rumsa, 212 F.2d 927 (7th Cir. 1954). This immediately-draftable policy was changed in 1971 and a one-year residency provision imposed. The draft is but of academic interest

allegiance were class-wide, there would have been no inductions. There seems little reason for State concern when the federal government--whose responsibilities include national defense--expressed none in determining who has been inducted into its armed forces.61/

C. The Alienage Classification In Section 3001(3) Creates An Irrebuttable Presumption That Violates The Constitution.

N.Y. Education Law § 3001(3) establishes irrebuttable presumptions that

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now, but the principle remains that the State has no legitimate interest in perpetuating a "disloyalty" stereotype in the face of this history of federal legislation.

61/ Historically, it appears that the "fear" of disloyalty has been more related to national origin than to citizenship per se. The Japanese curfew and evacuation cases of Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944), both involved American citizens who were of Japanese descent. But whether the sterotypes involve national origin or alienage, they are so archaic and overbroad as to be constitutionally prohibited.

non-declarant aliens are not personally committed to democratic principles, are not loyal to the United States, and therefore are not "suitable" to teach in New York's public schools. Those irrebuttable presumptions arise from stereotypic impressions that aliens have less interest or stake in community affairs than citizens; that aliens as a class lack both knowledge of and appreciation for traditional American values and that aliens as a class lack loyalty to the United States and its political and social institutions. As we have already discussed, these presumptions are not "necessarily or universally true in fact,"62/ and indeed are "often contrary to fact."63/ The State's reliance on such demonstrably false assumptions in determining the fitness of applicants for public school teaching jobs is irrational and fundamentally unfair, infringes the basic right of Appellees and other non-declarant aliens to work in the common occupations of their community, and does not relieve the State of substantial administrative burdens. Consequently, Section 3001(3) should be invalidated.64/

62/ Vlandis v. Kline, 412 U.S. 441, 452 (1973).

63/ United States Department of Agriculture v. Murry, 413 U.S. 508, 514 (1973).

64/ "[A] rule which disqualifies an entire class of persons from

The fact that the irrebuttable presumptions of Section 3001(3) are not universally true and indeed are often contrary to fact is evident upon examination of the statutory scheme itself. New York permits aliens who are statutorily barred from becoming citizens to be provisionally certified to teach in the public school system. Aliens who declare their intention to become citizens may also be certified to teach in the public schools. It should be obvious from the statute itself that it is not the fact that one is an "alien" which is determinative of one's ability to teach democratic principles and ideals. The statute recognizes that aliens can so perform.

Nor does the statutory scheme draw a rational distinction between declarant and non-declarant aliens. First, the State's assertion that citizens and declarant aliens, but not non-declarant aliens, "identify with the democratic principles, values and attitudes they will

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> professional employment is doubly objectionable. It denies the State access to unique individual talent; it also denies opportunity to individuals on the basis of characteristics that the group is thought to possess." Foley v. Connelie, supra at 1076 (Stevens, J., dissenting).

teach" is, at best, naive. Brief for Appellants at 25. In Schneiderman v. United States, 320 U.S. 118 (1943), this Court held that an admitted Communist, who held a leadership position in the party, and believed in the dictatorship of the proletariat, was eligible to declare an intention to become a citizen and to complete the naturalization process. Attachment to the principles of the Constitution, the Court held, does not mean attachment to the political philosophy that informs the Constitution, or to any particular constitutional principle, or even to a republican form of government. Rather, it is sufficient that the applicant for citizenship does not advocate the violent overthrow of the government, even if he advocates its downfall.

President Truman's message to the House of Representatives regarding his subsequently overridden veto of the Immigration and Nationality Act of 1952 similarly exposes the fallaciousness of the presumption--that non-declarant aliens lack commitment to democratic values--that the New York statute creates.

> Today, we are "protecting" ourselves, as we were in 1924, against being flooded by immigrants from Eastern Europe. This is fantastic. The countries of Eastern Europe have fallen under the Communist yoke--they are silenced, fenced off by barbed wire and mine fields--no one passes their borders but at the risk of his life.

> We do not need to be protected against immigrants from these countries--on the contrary we want to stretch out a helping hand, to save those who have managed to flee into Western Europe, to succor those who are brave enough to escape from barbarism, to welcome and restore them against the day when their countries will, as we hope, be free again. [H.R. Doc. No. 520, 82d Cong., 2d Sess. (1952).]

Amici represent many persons seeking admission to the United States who demonstrate the highest commitment to democratic values. For them, the decision to immigrate often involves great personal sacrifice and danger, and the decision to not seek United States citizenship often reflects the fervent hope that by retaining citizenship in the nation of their birth, they may some day be able to return to promote and enhance democratic values. If such aliens are, as a condition to teaching in the New York public schools, required to surrender their foreign citizenship, they may find it difficult, if not impossible, to return some day to their home countries. Fundamental fairness and due process require that New York afford non-declarant aliens an opportunity to demonstrate the often compelling and "inherently democratic" reasons which may underlie their decision to forego United States citizenship.

The primary justification for the creation of irrebuttable presumptions is the administrative convenience involved in applying general classifications rather than in making individualized determinations.65/ If the presumption is founded in fact, the presumption will apply perfectly to everyone within the general classification. Thus, the purpose of the statute, the classification scheme created, and the presumptions employed will match perfectly; there would never be a need to determine whether any single member of the class were improperly included.66/ There is no such perfect

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65/ See Weinberger v. Salfi, 422 U.S. 749 (1975).

66/ For example, if the presumption were universally true that all women four or more months pregnant were medically incapable of teaching, a class of women all four or more months pregnant could be created and excluded from teaching. The classification would, in that instance, exactly match the purpose of the statute -- to prevent medically unfit persons from teaching. But as the presumption moves away from being "universally true" or "true in most instances," the purpose and the classification diverge and, at some point, the

match under Section 3001(3), and individualized determinations are required.

Moreover, New York already individually certifies each public school teacher, whether a citizen or an alien. The State already has taken on the administrative "burdens" that irrebuttable presumptions have been created in the past to alleviate. Consequently, there is little point in New York making individualized certification decisions and at the same time imposing a fundamentally unfair, mechanical rule that excludes from that certification process criteria the State claims are relevant. Due process requires that the State afford non-declarant alien applicants the right during the certification process to rebut the erroneous presumptions Section 3001(3) creates.

In addition to the fact that no administrative convenience would be served

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presumption -- and classification -- must be invalidated. For, at that point, the justification for the irrebuttable presumption --avoidance of administrative burdens -- runs squarely into the fundamental unfairness of including within the presumption large numbers of persons for whom the presumption has no basis in fact. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

by irrebuttable presumptions in the instant case, the individual interest at stake--the right to work--is so important that the Court should carefully scrutinize the irrebuttable presumptions on which the State is relying. The Court's concern about the individual interests at stake in other irrebuttable presumption cases has resulted in the presumptions being invalidated.67/ Thus, because the presumptions in the instant case infringe on vital employment interests of aliens,68/ and because the use of the presumptions does not relieve the State of any administrative burdens, and because the presumptions have no basis in logic or fact, the presumptions -- and the alienage classification -- should be invalidated.

67/ Cleveland Board of Education v. LaFleur, supra (child bearing); United States Department of Agriculture v. Murry, supra (food); Stanley v. Illinois, 405 U.S. 645 (1973) (child custody).

68/ The invidiousness of the classification also has played a role when the Court has invalidated irrebuttable presumptions. See Cleveland Board of Education v. LaFleur, supra (sex); Stanley v. Illinois, supra (illegitimacy).

III. THE STATE HAS NO INTEREST IN REQUIRING PERMANENT RESIDENT ALIENS TO DECLARE AN INTENTION TO BECOME UNITED STATES CITIZENS AND SUCH A REQUIREMENT IS INVALID UNDER THE SUPREMACY CLAUSE OF THE CONSTITUTION

Permanent resident aliens such as the Appellees in the instant case have a status conferred upon them by federal law.69/ They have a federal statutory right to remain in the United States, and in any particular state, under conditions imposed by the federal, not the state, government. The state has no role to play in the regulation of immigration and naturalization, and it can have no legitimate interest in encouraging permanent resident aliens living in the state to become citizens.70/ Any interest

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69/ Both are federally registered permanent resident aliens. App. at 5, 17.

70/ "The first purpose offered by the [State of New York] . . . [to offer an incentive for aliens to become naturalized] is not a permissible one for a State. Control over immigration and naturalization is entrusted exclusively to the Federal Government, and a State has no power to interfere."

the State attempts to assert in this regard would be invalid under the Supremacy Clause.

A. The State Has No Role to Play With Respect to the Regulation of Immigration

The authority to regulate immigration is so exclusively a federal concern that, in the absence of an express congressional delegation, the States have no role whatsoever to play in the area.[71/] No delegation exists that permits the State to set conditions under which permanent resident aliens must, at the penalty of being excluded from their chosen profession, declare their intention to become United States citizens. Even assuming that such a requirement technically would not constitute the "regulation of immigration" so as to be precluded in the absence of express delegation,[72/] the State's attempt to act

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Nyquist v. Mauclet, supra at 9-10. Foley v. Connelie, supra, is distinguishable. See Part I-C supra.

71/ See, e.g., DeCanas v. Bica, 424 U.S. 351 (1976).

72/ See De Canas v. Bica, supra at 355. There can be little disagreement that when state legislation acts directly on lawfully admitted permanent

in this area -- an area in which the federal interest is overriding -- is constitutionally prohibited.

B. The State Cannot Impose Added Burdens on Federally Registered Permanent Resident Aliens

In Hines v. Davidowitz, 312 U.S. 52 (1941), the issue facing the Court was what role the State could play with respect to aliens residing in the United States when the federal government already was regulating in the area. The Court concluded:

> Legal imposition of distinct, unusual and extraordinary burdens and obligations upon aliens ... bears an inseparable relationship to the welfare and tranquility of all the states .... [T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the

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resident aliens, imposes restrictions on that residency, and conditions employment on surrendering foreign citizenship, it so touches the plenary federal power in the area that it must be treated as an invalid state regulation of immigration. See Graham v. Richardson, supra at 377-80.

> national government that where it acts, and the state also acts on the same subject, 'the act of Congress ... is supreme; and the law of the State ... must yield to it." [312 U.S. at 65-66]73/

In DeCanas v. Bica, 424 U.S. 351 (1976), the Court held that this "added burden" was the appropriate test of whether state legislation addressed to "aliens" could survive a pre-emption analysis:

> Of course, state regulation not congressionally sanctioned that discriminates against aliens lawfully admitted to the country is impermissible if it imposes additional burdens not contemplated by Congress:
>
> "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. See Hines v.

73/ Accord, Mathews v. Diaz, 426 U.S. 67, 84 (1976); Graham v. Richardson, supra at 380.

> Davidowitz, 312 U.S. 52, 66. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid." Takahasi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948) (emphasis supplied) [424 U.S. at 358 n.6.]

In the instant case, Congress has acted to permit permanent resident aliens to live in the United States as aliens under the conditions Congress sets. New York is attempting to place additional conditions on those same persons. The two laws cannot both be valid, and it is the state law that must yield.

IV. CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that the Court should affirm the judgment of the three-judge district court.

Respectfully submitted,

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